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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
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Washington, D.C. 20554

MM Docket No. 88-315

In the Matter of

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FM Broadcast Stations.	RM-7561
(Hawesville and Hardinsburg, Kentucky; Bloomfield, Huntingburg, Loogootee and Scottsburg, Indiana)[1]	

ORDER TO SHOW CAUSE

Adopted: October 24, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Harold Wayne Newton ("Newton"), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 4115 (1988), proposing the allotment of Channel 234A to Hawesville, Kentucky, as its second FM service. Petitioner failed to file comments restating his interest in the allotment.[2] HIC Broadcasting, Inc. ("HIC"), licensee of Station WHIC, Channel 232A, Hardinsburg, Kentucky, filed a counterproposal proposing the substitution of Channel 232C2 for Channel 232A at Hardinsburg.[3] In order to accomplish this upgrade, HIC proposes the substitution of Channel 231A for Channel 232A at Station WKMD, Loogootee, Indiana. Dubois County Broadcasting, Inc., d/b/a WBDC Radio ("WBDC"), Channel 265A, Huntingburg, Indiana, filed comments in opposition to the allotment of Channel 234A to Hawesville and comments in response to HIC's counterproposal. These comments will be treated as a counterproposal.[4] HIC filed reply comments. Community Broadcasting Service of Loogootee, Inc. ("Community"), filed a letter concerning the disposition of this proceeding[5] and a motion to strike WBDC's comments regarding HIC's counterproposal.

2. In its comments, HIC states that as the beneficiary of the Hardinsburg upgrade, it will compensate the licensee of Station WKMD as required by Commission policy.

3. In its counterproposal, WBDC requests the substitution of Channel 265B1 for Channel 265A at Huntingburg, Indiana, and the modification of its authorization for Station WBDC accordingly. To accomplish this substitution, WBDC also requires the substitution of Channel 287A for Channel 265A at Scottsburg, Indiana, and the modification of the license for Station WMPI at Scottsburg accordingly; the substitution of Channel 266C1 for Channel 266C at Russellville, Kentucky, and the modification of Station WBVR(FM) accordingly; and the allotment of Channel 234A rather than 264A at Philpot, Kentucky, in MM Docket No. 88-126. The alternate channel at Philpot was mutually exclusive to the Hawesville proposal when filed.[6] WBDC indicates its willingness to reimburse Station WMPI for its expenses in making the frequency change.[7]

4. We believe the public interest would be served by the consideration of HIC's counterproposal to substitute Channel 232C2 for Channel 232A at Hardinsburg, and WBDC's counterproposal to substitute Channel 265B1 for Channel 265A at Huntingburg, because each proposal could result in the provision of a wide area FM service to the respective communities. Dismissal of the Hawesville proposal eliminates any need to make a comparative analysis of the proposals in this proceeding.

5. In order to proceed with the consideration of HIC's counterproposal in this proceeding, we must issue an *Order to Show Cause* to Community Broadcast Service of Loogootee, Inc., licensee of Station WKMD(FM), Loogootee, Indiana, seeking comment as to why its license should not be modified to specify operation on Channel 231A instead of 232A, as requested by HIC. We need not issue an *Order to Show Cause* to the licensee of Station WMPI, Scottsburg, Indiana, as the licensee has consented to the frequency change and site relocation. This *Order to Show Cause* does not provide additional opportunity either to comment on the merits of the proposals or for the acceptance of counterproposals.

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Community Broadcast Service of Loogootee, Inc., licensee of Station WKMD(FM), Loogootee, Indiana, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 231A in lieu of Channel 232A.

7. Pursuant to Section 1.87 of the Commission's Rules, Community Broadcast Service of Loogootee, Inc., may, not later than **December 30, 1991,** file a written statement

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[1] The communities of Hardinsburg, Kentucky, Bloomfield, Huntingburg, Loogootee, and Scottsburg, Indiana have been added to the caption.

[2] Newton's proposal was dismissed in a *First Report and Order* in MM Docket No. 88-315, 6 FCC Rcd 5138 (1991).

[3] Public Notice of the counterproposal was given October 7, 1988, Report No. 1752.

[4] Public Notice of the counterproposal was given on August 16, 1991, Report No. 1856. River Valley Radio, Inc. ("River Valley"), licensee of Station WRBT(FM), Channel 235B, Mount Carmel, Illinois, filed comments in response to this Public Notice regarding WBDC's counterproposal. River Valley challenges the acceptability of WBDC's proposal. We will resolve this issue in the *Second Report and Order* in this proceeding.

[5] Community's letter was filed after the comment deadline in this proceeding and, therefore, will not be considered.

[6] We note that Channel 234A has been allotted to Philpot, Kentucky, in lieu of Channel 264A in MM Docket No. 88-126. *See Report and Order*, 5 FCC Rcd 2538 (1990), *recon. pend.* Therefore, we need not propose the Philpot substitution here. We will not take final action in this docket until the reconsideration in MM Docket No. 88-126 has been addressed.

[7] WBDC also claims that its proposed upgrade would require Station WBVR, Russellville, Kentucky, to substitute Channel 266C1 for Channel 266C at its current site. However, Station WBVR was downgraded from Channel 266C to 266C1 by *Report and Order* in MM Docket No. 88-320, 3 FCC Rcd 7030 (1988). Station WBVR is presently licensed to operate on Channel 266C1 at Russellville.

showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Community Broadcast Service of Loogootee, Inc., to furnish additional information. If Community Broadcast Service of Loogootee, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Community Broadcast Service of Loogootee, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Community Broadcast Service
of Loogootee, Inc.
P.O. Box 155
Loogootee, Indiana 47553
(Licensee of Station
WKMD(FM))

Donald R. Rice
3774 North Road 450 West
Kokomo, Indiana 46901
(Licensee of Station
WMPI(FM))

John E. Fiorini, III
Mark Van Bergh
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(Attorneys for River
Valley Radio, Inc.)

Dennis F. Begley
Reddy, Begley, & Martin
2033 M Street, N.W.,
Suite 500
Washington, D.C. 20036
(Counsel for HIC
Broadcasting Inc.)

Jerrold Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20036
(Counsel for Dubois County
Broadcasting, Inc. /WBDC)

9. In addition, a copy of any comments filed in this proceeding should be served on all parties listed in paragraph 8.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-107

In the Matter of

Amendment of Section 73.202(b),	RM-7640
Table of Allotments,	
FM Broadcast Stations.	
(Huntingdon and Atwood,	
Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of WJPJ, Inc. ("petitioner"), permittee of Station WTKB-FM (formerly WBVD-FM), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2076 (1991), proposing the reallotment of Channel 229A from Huntingdon to Atwood, Tennessee, and the modification of Station WTKB-FM's construction permit to specify Atwood as the community of license. Petitioner and Big Tenn Communications Company, Inc., filed joint comments supporting the proposal.[1] No other comments were received.

2. We believe the public interest would be served by reallotting Channel 229A from Huntingdon to Atwood, Tennessee, and modifying Station WTKB-FM's construction permit accordingly. We believe that petitioner has demonstrated that the reallotment of Channel 229A to Atwood will result in a preferential arrangement of allotments. Atwood will receive its first local FM transmission service while Huntingdon would retain local aural transmission service from Station WVHR-FM and one AM station.

3. Channel 229A can be allotted to Atwood, Tennessee, in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) south to accommodate the desired transmitter site.[2] As proposed, we will also modify the construction permit for Station WTKB-FM to specify Channel 229A at Atwood, Tennessee.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Atwood, Tennessee	229A
Huntingdon, Tennessee	265A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Big Tenn Communications Company, Inc., for Station WTKB-FM, Huntingdon, Tennessee, IS MODIFIED to specify operation on Channel 229A at Atwood, Tennessee, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Big Tenn Communications Company Inc., permittee of Station WTKB-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit (BAPH-910204HQ) for Station WTKB-FM was assigned from WJPJ, Inc., to Big Tenn Communications Company, Inc., on March 7, 1991.

[2] The coordinates for Channel 229A at Atwood are North Latitude 35-56-00 and West Longitude 88-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-114

In the Matter of

Amendment of Section 73.202(b), RM-7457
Table of Allotments,
FM Broadcast Stations.
(Othello, East Wenatchee and Cashmere,
Washington, and Wallace, Idaho)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of P-N-P Broadcasting, Inc. ("petitioner"), permittee of Station KZLN-FM, Othello, Washington, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 2138 (1991), requesting the substitution of Channel 248C1 for Channel 248C3 at Othello, and the modification of Station KZLN-FM's construction permit to operate on the higher powered channel.[1] The *Notice* also proposed the substitution of Channel 266A for Channel 249A at East Wenatchee, Washington, and the modification of Station KYSN(FM)'s license to specify the alternate channel; the substitution of Channel 294A for Channel 266A at Cashmere, Washington, and the modification of Station KZPH's construction permit to specify the alternate channel; and the downgrade of vacant and unapplied for Channel 248C at Wallace, Idaho, to Channel 248C2. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. KKNW Company ("KKNW"), licensee of Station KKNW, Bremerton, Washington, and Robert C. LaBonte ("LaBonte"), former licensee of Station KYSN(FM), East Wenatchee, Washington, filed comments opposing the proposal. Stephenson Broadcasting, Inc. ("Stephenson"), present licensee of Station KYSN(FM), filed an opposition to the *Order to Show Cause*. Petitioner and Stephenson filed reply comments.[2]

2. In his opposition,[3] LaBonte argues that it is "highly speculative whether [petitioner] has the inherent ability, commitment or financial viability to exercise its authority under its Construction Permit," and its proposal is, therefore, frivolous and does not warrant consideration. LaBonte states that it has been over three years since the petitioner filed an application for the Othello station, but the station has not yet begun operation. Instead, petitioner has requested a series of delays and modifications of its permit. LaBonte argues that the relocation of Station KYSN(FM) to another frequency, in order to accommodate the "high speculative possibility that KZLN will ever get on the air," would be severely disruptive to Station KYSN(FM). LaBonte argues that petitioner makes no commitment as to the extent of reimbursement or whether it is financially able to pay. Finally, LaBonte states that although the change in frequency could permit operation of Station KYSN(FM) as a six kilowatt facility, the increase in power would be useless due to the surrounding terrain.[4]

3. In its comments, petitioner supports its proposal for the substitution of Channel 248C1 for Channel 248C3 and the modification of Station KZLN-FM's construction permit accordingly, and the substitutions and modifications required to accommodate its request. In response to LaBonte's opposition, petitioner states its full commitment to providing service to Othello and is proceeding with the construction of its Class C3 facilities. It states that delays in construction were due to waiting for approval for a previous petition to upgrade and finding an available transmitter site near a power source. Petitioner reiterates its intention to reimburse Station KYSN(FM) for reasonable expenses incurred in making the change to the new frequency in accordance with Commission precedent. It states that it will work with Station KYSN(FM) to minimize any adverse impact related to the channel substitution. Petitioner also states it has reached an agreement with Upper Valley Broadcasting Corporation ("Upper Valley"), permittee of Station KZPH, Cashmere, Washington, in which Upper Valley would or not oppose the substitution of Channel 294A for Channel 266A at Cashmere and the modification of its permit accordingly.

4. In its comments, KKNW Company, licensee of Station KKNW, Channel 295C1, Bremerton, Washington, argues that the Cashmere substitution from Channel 266A to Channel 294A would preclude its ability to relocate its transmitter and antenna from its current site in downtown Seattle to a site at Cougar Mountain, 18 kilometers southeast of Seattle.[5] KKNW states the proposed changes would create a 13.4 kilometer short-spacing between Station KZPH and Station KKNW's desired location at Cougar Mountain. Since it is unable to offer an alternate proposal, KKNW concludes it would be necessary to seek a waiver of Section 73.215(e) so it can improve its facilities and better service its market from Cougar Mountain, despite the short-spacing to Station KZPH in Cashmere. KKNW contends that an engineering analysis demonstrates that the existence of extensive terrain obstructions

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[1] As stated in the *Notice*, the petitioner's application to downgrade its construction permit to operate on Channel 248C3 in lieu of Channel 248C2 was granted on March 25, 1991.

[2] Stephenson also filed a letter with further reply comments after the deadline for reply comments. In accordance with Section 1.415(d) of the Commission's Rules, these reply comments will not be considered herein.

[3] LaBonte states Stephenson joins in filing this opposition.

[4] LaBonte also requests that petitioner's petition be denied prior to the initiation of a full rule making proceeding, pursuant to Commission Rule 1.401(e). This request is now moot.

[5] The Cougar Mountain site is being developed as an "environmentally sound 10-station common antenna installation that will result in the dismantling of multiple individual antenna structures currently used by stations that will share the common antenna. It will also enable those stations to provide better FM service to the Bremerton/Seattle/Tacoma market."

between Cashmere and Cougar Mountain makes it virtually impossible that interference would be caused or received by either station due to a short-spacing. Therefore, KKNW concludes the allotment of Channel 294A at Cashmere would necessitate that KKNW file, in due course, an application and waiver request of the short-spacing rules to effectuate a change in transmitter location to Cougar Mountain.

5. Stephenson, in response to the *Order to Show Cause*, reiterates the objections to the proposal expressed in LaBonte's comments regarding petitioner's failure to make any appreciable progress in bringing the station on the air or to meet its commitments to the Commission. Stephenson references a number of extensions requested by petitioner since 1988. Thus, Stephenson concludes that the petition fails to set forth sufficient support material establishing that the public interest would be served and should be dismissed. Stephenson argues that this petition should be rejected pursuant to our policy that we will not consider proposals that require more than two operating stations to change their frequencies, citing *Columbus, Nebraska*, 59 RR 2d 11184 (1986). Stephenson states that Stations KYSN(FM) and KZPH would have to move, as would Station KWWW, a translator. Should the Commission grant this petition, Station KYSN(FM) suggests that in light of petitioner's failure to build its station, petitioner should be required to demonstrate financial viability. Stephenson states that its reimbursement costs will be approximately $35,000, and suggests that the Commission should condition any grant on petitioner's payment in advance, or in escrow, of $35,000 for costs which will be incurred by the station for change in frequency. Stephenson states that the Commission has required such payment in advance, citing *Columbus, Nebraska*, 59 RR 2d 1184 (1986); and *Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990). Stephenson also requests 180 days to prepare its listeners and itself for any substitution.

6. In its reply comments, petitioner denies Stephenson's allegations that "[i]n light of P-N-P's utter failure to make any appreciable progress in bringing its station on the air or to meet its commitments to the Commission, it is highly speculative whether P-N-P has the inherent ability, commitment or financial viability to exercise its authority under its Construction Permit." Petitioner argues that it is fully committed to bringing FM radio service to Othello in accordance with its construction permit. It also disputes Stephenson's claim that the changes it seeks will require a serious disruption to KYSN(FM)'s service to the public. While, petitioner concedes that there will be some disruption to Station KYSN(FM), it believes that the adverse impact will be minor. Petitioner contends that Station KYSN(FM) objects to Stephenson's request for $35,000 to cover costs of the channel substitution as overly high, but states that it is willing to negotiate. Petitioner reaffirms its commitment to reimburse Stations KYSN(FM) and KZPH for reasonable expenses incurred in making the changes to the new frequencies, and to that end, states its willingness to establish escrow accounts with reasonable funds to pay for these expenses.

7. Petitioner also states KKNW's comments essentially serve to notify the Commission about a planned transmitter and antenna relocation to Cougar Mountain for its station. While KKNW does not specifically object to the proposal, KKNW points out that the proposal will adversely impact its planned relocation. Petitioner concludes that the proposed antenna location of KKNW can be reasonably accommodated if the proposed changes occur.

8. Stephenson, in his reply comments, reiterates its assertions of the petitioner's history of statements and promises made to the Commission. It also states that KKNW's comments give the Commission further grounds to deny this petition due to the disruptive effect it would have on more than two licensed stations. Stephenson concludes that KKNW's comments serve to underscore its contention that the proposed changes would cause a chain of hardships on more than two stations and, therefore, should be denied in accordance with Commission policy not to approve proposals which would affect more than two licensees. Stephenson concludes that the balance of speculative and marginal public benefit of petitioner's proposed changes with the cost and disruptions to the listening public means that grant of this petition is not in the public interest. Stephenson argues that, in the alternative, if the proposal is granted, it urges the Commission to recognize that the unique facts present in this petition call for an unusual response. In particular, Stephenson recommends that the Commission devise a plan wherein the listening public will not be disrupted, and neither Station KYSN(FM) or the other affected stations will have to incur expenses on the proposed changes in this proceeding, unless the petitioner can demonstrate appreciable progress. It suggests that the Commission establish progress performance dates which the petitioner must certify that it has achieved specific measurable progress toward construction and completion of its facilities. Furthermore, Stephenson requests that the Commission condition the allotment on (a) the establishment of an escrow account of $35,000, a good-faith estimate of the cost which would be incurred by KYSN for change in frequency; (b) a delay in the effective date of any final report and order until petitioner completes construction of its facilities; and (c) a grant to Station KYSN of 180 days after the effective date of the changes before it would be required to begin broadcasting at a new frequency.

9. Based on the information before us, we believe the public interest would be served by substitution of Channel 248C1 for Channel 248C3 at Othello, the substitution of Channel 266A for Channel 249A at East Wenatchee, the substitution of Channel 294A for Channel 266A at Cashmere, and the downgrade of Channel 248C at Wallace to Channel 248C2, in order to provide Othello with a wide coverage area FM transmission service. There has not been a substantial or material question of fact raised or a demonstration that Station KYSN(FM) would be unduly harmed by the modification of its license to specify operation on another channel. The fact that petitioner has repeatedly sought extensions of its construction permit does not indicate bad faith, or indicate that petitioner will never construct its station. Indeed, the Commission has granted each extension request.

10. Under Commission policy, all affected stations will be afforded a significant period of time before they are required to change to the new frequencies. It is generally not necessary for a change in frequency to take place until use of the existing frequency actually prevents a newly authorized station from inaugurating service. *See Broken Arrow and Bixby, Oklahoma and Coffeyville, Kansas*, 4 FCC Rcd 6981 (1989); and *Albany, Buffalo, Ilion and Utica, New York, and Boston, Massachusetts*, 2 FCC Rcd 4300 (1987). Pursuant to Commission policy, re-

imbursement of Stations KYSN(FM) and KZPH for the reasonable costs of changing their frequencies will be required and governed by *Circleville and Columbus, Ohio,* 8 FCC 2d 159 (1968). We do not normally require advance payment or escrow accounts, and see no reason to do so here. We expect parties to negotiate in good faith, subject to Commission review in the event of disagreement. *See Mayfield and Wickliff, Kentucky,* 48 RR 2d 1232 (1981). Furthermore, no station need take steps to change frequency until it is assured that it will receive payment. *See Churchville and Luray, Virginia, supra, recon. denied,* 6 FCC Rcd 1313 (1991).

11. Finally, we note that KKNW Company has not requested permission to relocate its transmitter and antenna from Seattle to Cougar Mountain, Washington. Therefore, we will not consider the possibility that this station may, at some future time, request such a relocation in resolving this proceeding. *See Hardinsburg, Kentucky,* 5 FCC Rcd 7684 (1990).[6]

12. Channel 248C1 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.0 kilometers (8.7 miles) southwest to avoid a short-spacing to the proposed allotment of Channel 247A at Davenport, Washington.[7] Channel 266A can be allotted to East Wenatchee at Station KYSN's licensed site, with a site restriction of 4.1 kilometers (2.6 miles) south to avoid a short-spacing to Station KEYF(FM), Channel 266C, Cheney, Washington.[8] Channel 294A can be allotted to Cashmere at the site specified in Station KZPH's construction permit, with a site restriction of 4.2 kilometers (2.6 miles) west to avoid a short-spacing to Station KKNW, Channel 295C1, Bremerton, Washington.[9] Channel 248C can be downgraded to Channel 248C2 at Wallace, Idaho, with a site restriction of 1.3 kilometers (0.8 miles) northeast to avoid a short-spacing to Station KISC, Channel 251C at Spokane, Washington.[10] Canadian concurrence has been obtained since Othello, East Wenatchee, Cashmere and Wallace are located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g), we will also modify petitioner's construction permit for Station KZLN-FM to specify operation on Channel 248C1; modify Stephenson's license for Station KYSN(FM) to specify operation on Channel 266A; and modify Upper Valley's construction permit for Station KZPH to specify operation on Channel 294A.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991,** the FM Table of of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Othello, Washington	248C1
East Wenatchee, Washington	266A
Cashmere, Washington	294A
Wallace, Idaho	248C2, 264C

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of P-N-P Broadcasting, Inc., for Station KZLN-FM, Othello, Washington, IS MODIFIED to specify operation on Channel 248C1, in lieu of Channel 248C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

15. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, P-N-P Broadcasting, Inc., permittee of Station KZLN-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Stephenson Broadcasting, Inc., for Station KYSN(FM), East Wenatchee, Washington, IS MODIFIED to specify operation on Channel 266A in lieu of Channel 249A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KYSN(FM)'s license, BLH-811009AK, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-811009AK, except for the

[6] We make no determination on the merits of any waiver requests that KKNW Company may request in future application proceedings.

[7] The coordinates for Channel 248C1 at Othello are North Latitude 46-45-28 and West Longitude 119-19-10.

[8] The coordinates of Channel 266A at East Wenatchee are North Latitude 47-22-52 and West Longitude 120-17-16.

[9] The coordinates for Channel 294A at Cashmere are North Latitude 47-30-35 and West Longitude 120-31-24.

[10] The coordinates for Channel 248C2 at Wallace are North Latitude 47-28-40 and West Longitude 115-54-38.

channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Upper Valley Broadcasting Corp., for Station KZPH, Cashmere, Washington, IS MODIFIED to specify operation on Channel 294A in lieu of Channel 266A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KZPH's construction permit, BLH-870908MB, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BLH-870908MB, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Stephenson Broadcasting, Inc. 960 Valley Mall Parkway East Wenatchee, Washington 98802	Upper Valley Broadcasting Corp. P.O. Box 523 Leavenworth, Washington 98826

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-176

In the Matter of

Amendment of Section 73.202(b), RM-7738
Table of Allotments,
FM Broadcast Stations.
(Fortuna and Rohnerville,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 22, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making,* 6 FCC Rcd 3650 (1991), issued in response to a petition filed by North Star Communications ("petitioner"), permittee of Station KQEX(FM), Channel 263A, Rohnerville, California, proposing to amend the FM Table of Allotments by substituting Channel 262C2 for Channel 263A and changing its community of license from Rohnerville to Fortuna, California, to provide that community with its first local FM service. Petitioner filed supporting comments reaffirming its intention to apply for Channel 262C2 if allotted to Fortuna, as requested. No other comments were received.

2. In support of its proposal, petitioner stated that in view of Fortuna's location in the Eel River Valley Basin, an area subject to seasonal flooding, a wide area coverage transmission service is essential to provide area residents with vital information related thereto when such disasters occur.

3. As stated in the *Notice,* Fortuna is presently served locally by fulltime Station KNCR(AM). Although a grant of petitioner's request would result in the removal of the only potential service at Rohnerville,[1] this proposal is unique since Rohnerville no longer exists as a separate entity. Petitioner provided certified information in its petition for rule making demonstrating that Rohnerville was annexed to, and incorporated within, the City of Fortuna fifteen years ago.[2] Additionally, petitioner provided an official map of Fortuna which demonstrates that the boundaries of Rohnerville are entirely within the confines of Fortuna. Under the circumstances, we find that petitioner's proposal does not violate the Commission's allotment criteria, and is distinguishable from situations in which a licensee may seek to remove the only local broadcast service from a community with the express intention of reallotting the service to a nearby community. Therefore, on the basis of the record before us, we believe the public interest would be served by substituting Channel 262C2 for Channel 263A and modifying the permit of Station KQEX(FM) to specify operation on Channel 262C2 at Fortuna, as requested.

4. Channel 262C2 can be allotted to Fortuna at the petitioner's currently authorized site in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[3]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Fortuna, California	262C2
Rohnerville, California	--

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of North Star Communications (File No. BPH-880126NQ) for Station KQEX(FM), IS MODIFIED to specify operation on Channel 262C2 at Fortuna, California, in lieu of Channel 263A at Rohnerville, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, North Star Communications, permittee of Station KQEX(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

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[1] Station KQEX(FM)'s permittee status at Rohnerville constitutes a "potential service" rather than an "existing service" for purposes of Section 1.420(i) of the Commission's Rules.

[2] According to the U.S. Census Bureau, the annexation of a community by an adjacent municipality obviates its posture as a separately distinct community. *Geographic Areas Handbook,* U.S.C.B., March 1984.

[3] Coordinates at the authorized site of Station KQEX(FM) are 40-30-03 and 124-17-10.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-587

In the Matter of

Amendment of Section 73.202(b), RM-7479
Table of Allotments,
FM Broadcast Stations.
(Tusculum, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Tusculum Regional Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7069 (1990), proposing the allotment of Channel 276A to Tusculum, Tennessee. Petitioner filed comments reiterating its intention to apply for channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 276A to Tusculum, since it could provide the community with its first local FM service. Channel 276A can be allotted to Tusculum in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.0 kilometers (5 miles) east to avoid a short-spacing to Station WIMZ-FM, Channel 278C, Knoxville, Tennessee.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tusculum, Tennessee	276A

4. The window period for filing applications will open on **December 24, 1991,** and close on **January 23, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 276A at Tusculum are North Latitude 36-10-58 and West Longitude 82-40-14.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-211

In the Matter of

Amendment of Section 73.202(b), RM-7548
Table of Allotments,
FM Broadcast Stations.
(Tallulah, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1991; Released: November 4, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Sharing, Inc. ("petitioner"), licensee of Station KBYO-FM, Channel 285A, Tallulah, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4370 (1991), proposing the substitution of Channel 283C3 for Channel 285A at Tallulah, and modification of Station KBYO-FM's license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 283C3 for Channel 285A at Tallulah, since it would provide the community with a wide coverage area FM service. Channel 283C3 can be allotted to Tallulah in compliance with the Commission's minimum distance separation requirements at the petitioner's present transmitter site.[1] As proposed, we will also modify petitioner's license for Station KBYO-FM to specify operation on Channel 283C3 in accordance with the provision of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tallulah, Louisiana	283C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sharing, Inc. for Station KBYO-FM, Tallulah, Louisiana, IS MODIFIED to specify operation on Channel 283C3, in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sharing, Inc., licensee of Station KBYO-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 283C3 at Tallulah are North Latitude 32-24-10 and West Longitude 91-04-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

SBM COMMUNICATIONS, INC.	File No. BPH-880816MM
HEIDI DAMSKY	File No. BPH-880816MW
GEORGE W. BARBER, JR.	File No. BPH-880816MY
GEORGE I. O'REAR	File No. BPH-880816NL
WEDA, LTD.	File No. BPH-880816NR
Willie Huff, Deborah Huff and Adrienne E. Lee, A Partnership, d/b/a HOMEWOOD PARTNERS	File No. BPH-880816NU
HOMEWOOD COMMUNITY BROADCASTERS, LTD.	File No. BPH-880816OQ

For Construction Permit for
New FM Station, Channel 247A,
Homewood, Alabama

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1991; Released: November 6, 1991

By the Review Board:

1. Before the Review Board is an Appeal, filed August 27, 1991, by Homewood Community Broadcasters, Ltd. (Appellant) pursuant to 47 CFR § 1.301(a)(1) from a *Memorandum Opinion and Order*, FCC 91M-2576, released August 19, 1991 (*MO&O*), by Administrative Law Judge Joseph Chachkin (ALJ) dismissing appellant's application. An Opposition was filed by the Mass Media Bureau (or Bureau) on September 9, 1991.[1]

BACKGROUND

2. Appellant's application, filed August 16, 1988, contained only facsimile-transmitted signatures of its general partner on (1) the transmitter site certification page (Section VIII, p.1); (2) the ultimate certification page (Section VII, p.2); and (3) the Model Equal Employment Opportunity Program which accompanies the application. The *Hearing Designation Order*, 6 FCC Rcd 708 (1991), released more than two years later, made no mention of facsimile pages in appellant's application. On April 9, 1991, one of appellant's opponents (Homewood Partners) filed a Motion to Dismiss, urging that appellant's application be dismissed summarily because the application failed to contain a handwritten signature in violation of 47 CFR § 73.3513. The *MO&O* under appeal granted the motion, reasoning that dismissal of appellant's application was compelled by *Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991) and *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990). The *MO&O* held (at para. 3; footnote omitted):

> The Commission . . . held [in *Salvateriello*] that an original application must contain an original signature, that a signature transmitted via a facsimile machine is not an original signature for the purpose of Section 73.3513 of the Rules, and that an application containing only an electronically produced copy of a signature (such as in the case of [Appellant's] application) is defective and cannot be granted. Further, the Commission ruled that an applicant's facsimile signature would render the application "insufficient for tender and, therefore, uncorrectable by a post-filing window amendment." *Salvatoriello*, paragraph 14. Like the applicants in *Salvatoriello*, [Appellant] is also a commercial FM applicant subject to the "hard look approach." Its defective application must also be dismissed.

3. The ALJ held that the instant case differs from *Salvatoriello* only in that the deficiency there was caught on the processing line, with that application summarily rejected. But, citing to *Pueblo*, where another "tenderability" defect (violation of the United States-Mexico Agreement) was discovered *after* the case reached the hearing process, the ALJ concluded that appellant's "fatal tenderability defect, notwithstanding it was discovered later in the process, requires dismissal of its application." *MO&O* at para. 4 (footnote omitted). The Bureau supports the ALJ's ruling.

APPEAL

4. Appellant does not here dispute that the subject application signatures were facsimiles, but it contends that both *Salvatoriello* and *Pueblo* are inapposite to the instant case. Appellant argues that, unlike *Salvatoriello*, it has here incurred significant costs in prosecuting its application, including payment of the $6760 hearing fee. It would also limit the holding in *Pueblo* to the facts of that case, *viz.*, that an application facially inconsistent with the "international spectrum licensing agreement" is subject to summary dismissal. Appeal at 2. Appellant argues that dismissal of its application exalts form over substance, inasmuch as its "general" partner *did* sign the application before filing with the Commission. Thus, it claims to have satisfied the rationale behind the signature requirement, to wit (1) to ensure that the applicant has reviewed its application and attests its accuracy; and (2) to ensure applicant accountability so as to maintain the integrity of the Commission's application process. Appellant asserts that an original signature, electronically transmitted, will serve both purposes of the Commission's signature requirement. Finally, appellant submits that, even if *Salvatoriello* is correct that electronically transmitted signatures do not comply with the Commission's application rules, that rule interpretation was not known at the time

it filed its application, and that dismissal of its application therefore violates its due process rights under 47 U.S.C. § 309(d).

DISCUSSION

5. We will deny the instant appeal on the grounds stated below. Initially, although both the *MO&O* and the Bureau rely upon the Commission's "*Hard Look Order*" [2] as the predicate for dismissal of appellant's application, the Board has expressly held that:

> It is clear that these new [*Hard Look Order*] processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR § 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988) (subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

George Henry Clay, 5 FCC Rcd 317, 318 (Rev. Bd. 1990)(original emphasis), *recon. denied*, 5 FCC Rcd 2997 (1990). And, as we recently noted in *Rio Grande Broadcasting Co.*, FCC 91R-85, released September 26, 1991 at n.6, the Commission has never modified *Clay*.

6. Our view that *Clay* was, and remains, good law is reinforced by *Pueblo*, where the Commission affirmed the Board's denial of a dismissal appeal because the applicant with a defective application, which as here slipped through the processing line with its defect undetected, had failed to show the "good cause" required under § 73.3522(b) for postdesignation amendments. As to the interplay between § 73.3522(b) and *Hard Look*, the Commission stated:

> *Although the "hard look" processing procedures did not alter the standards for acceptance of postdesignation amendments*, the policy and precedent associated with the "hard look" necessarily affect the good cause analysis to which postdesignation amendments are subject, since otherwise the acceptance of post-designation amendments would undermine the benefits of "hard look."

5 FCC Rcd at 6279 (emphasis added). That is, while *Hard Look* processing standards are not applied, *per se*, at the postdesignation stage, a stage governed by § 73.3522(b), any attempt to amend a defective application that implicates *Hard Look* deficiencies will be considered in "good cause" determinations, particularly under the "due diligence" prong.[3]

7. Inasmuch as appellant, so far as the record and pleadings show, does not have before the Commission an application that, for lack of cognizable applicant signatures, can be granted, *see Salvatoriello*,[4] and has not attempted to amend its application (let alone shown "good cause"), we will not order reinstatement. *Compare Rio Grande Broadcasting* (applicant reinstated where ALJ misapplied *Salvatoriello)*.

8. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed August 27, 1991 by Homewood Community Broadcasters, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The Bureau would also dismiss the appeal on procedural grounds, noting that the appeal was filed one day late. We have herein stated the Board's views as to why the appeal will be denied, should any higher reviewing authority find that the appeal should not be dismissed because of lateness. *See Capitol City Broadcasting Co.*, FCC 91R-86, released September 26, 1991, at n.1.

[2] *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936 [58 RR 2d 776] May 13, 1985) (*Hard Look Order), recon. denied*, 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without published opinion sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).

[3] While we do not speculate on whether appellant might have been able to make a "good cause" showing, we do note that "due diligence" runs "from the time the applicant is, or should have been, apprised of the problem requiring amendment." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1988). In that regard, we observe that the Bureau's interpretation of the signature requirements of 47 CFR § 73.3513, affirmed in *Salvatoriello*, was issued in March, 1990. *See Radio South Burlington, Inc.*, 5 FCC Rcd 1688 (Audio Services Div. 1990). Even if appellant maintained a different interpretation of § 73.3513 until that point, *Radio South Burlington* controlled unless or until reversed by the Commission. 47 CFR § 0.203(b). Moreover (1) the Motion to Dismiss appellant's application for lack of cognizable signatures was filed on April 9, 1991; (2) the Commission's *Salvatoriello* decision was released on August 1, 1991; and (3) the *MO&O* under appeal was issued on August 19, 1991. Again, so far as we are aware, no amendment has been tendered by appellant, nor, of course, any "good cause" showing for acceptance.

[4] To the degree that appellant continues to argue that a facsimile signature complies with § 73.3513, *see Appeal* at 5, the Board must abide by *Salvatoriello*. That case also held that the rule gave adequate notice of the signature requirements. 6 FCC Rcd at 4707-08. Moreover, given the importance of original signature requirements placed on that rule by *Salvatoriello*, we might no longer be able to describe a signature amendment as correcting a "minor ministerial mistake" of the type adverted to in *Clay, see supra* para. 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Walter K. and Hazel C. Mickelson File No. 91235
Las Cruces, NM

For Waiver of the Rules

ORDER

Adopted: October 28, 1991; Released: November 4, 1991

By the Chief, Land Mobile and Microwave Division:

1. Walter K. and Hazel C. Mickelson (Mickelson) seek waiver of Section 94.65(f) of the Commission's Rules, 47 C.F.R. § 94.65(f), to utilize 10 kHz offset frequencies on channels H1, H2 and H3 in the Private Operational Fixed Microwave Service's 2650-2690 MHz band. Mickelson has requested a new station authorization for these channels in the Las Cruces, New Mexico area. Its proposed site, however, is 36.5 miles from three licensed stations, a distance less than the 50 mile separation required for normal H-channel licensing.

2. Requests to short-space H-channel stations must include a detailed demonstration that an exception to the 50 mile separation criterion is warranted and a statement that all affected parties have agreed to accept the short-spacing arrangement, *Public Notice*, FCC Mimeo 536, November 17, 1988. Here, the agreements to accept short-spacing submitted with the application are subject to the applicant's employment of a frequency offset. As Mickelson's engineering analysis confirms, a 10 kHz frequency offset is necessary to avoid unacceptable interference. Mickelson argues that no alternatives are available to it and that waiver is necessary to implement its proposed system.

3. We will deny the waiver request. Mickelson's proposed 10 kHz frequency offset would encroach upon adjacent G-channels licensed to instructional television fixed stations. Such encroachment would increase interference potential to prospective G-channel licensees, prejudicing future instructional television use. Further, the proposed frequency offset could create difficulties for prospective H-channel users, who might wish to coordinate their systems in the area.

4. We conclude under these circumstances that waiver is not warranted. The potential for interference to prospective H-channel and G-channel users in the area outweighs any benefit to be gained by the operation proposed. Accordingly, pursuant to Sections 0.331 and 1.3 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.3, the request for waiver filed by Walter K. and Hazel C. Mickelson, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: November 5, 1991

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Tele-Communications, Inc.
4643 S. Ulster Street
Suite 600
Denver, Colorado 80237

In re:

TCI Cablevision of Maryland, Inc.
Elkton, Maryland
MD0047

North East, Maryland
MD0048

Charlestown, Maryland
MD0280

Gentlemen:

This is a Notice of Apparent Liability for forfeiture issued pursuant to §503(b) of the Communications Act of 1934, as amended. TCI Cablevision of Maryland, Inc. (hereinafter TCI) has incurred liability in the amount of twenty-three thousand, seven hundred fifty dollars ($23,750) based on the following apparent violation of the Commission's Rules:

> Emission of radiation in excess of twenty (20) microvolts per meter measured at a distance of ten feet from the cable on January 22 and 23, 1991, in violation of §76.605(a)(11) of the Commission's Rules.

Section 76.605(a)(11) of the Commission's Rules prohibits cable systems, operating in the 54-216 MHz band, from radiating in excess of 20 microvolts per meter at a distance of ten (10) feet from the cable. It is apparent from the severity and number of leaks found that TCI has extensive leakage problems (see Appendix I attached). Under the Commission's regulatory framework, a cable system's use of the spectrum is dependent upon its ability to control signal leakage. Cable operators transmit signals by coaxial cable and should not radiate signals in excess of the standards set out in the Commission's Rules. This allows cable television systems and authorized over-the-air users to use the same frequencies in the same area. To do so, systems must meet stringent Commission radiation standards to ensure that their use of frequencies in the coaxial cable will not interfere with proximate authorized over-the-air services. Where aeronautical frequencies are involved, the need for cable signal integrity is vital. The Commission has repeatedly expressed its concern over the danger that exists to life and property from cable systems, such as TCI's, which radiate signal excessively. *Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984); *recon. denied*, 100 FCC 2d 117 (1985); *Report and Order in Docket No. 21006*, 65 FCC 2d 813 (1977).

On January 22 and 23, 1991, staff from the Commission's Field Operations Bureau at Baltimore, Maryland inspected TCI's cable system serving Elkton, North East and Charlestown, Maryland. It was discovered that on both days, the system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of §76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on January 23, 1991, it was also determined that the system's operation in such a manner constituted a threat to aeronautical communications. In this regard, the Commission has indicated that a cable system operating with an ambient signal leakage level exceeding the Cumulative Signal Leakage Index (CLI) criteria set forth in §76.611 of the Rules, such as TCI's, endangers the functioning of the radionavigation service or aeronautical communications.[1] *See Second Report and Order in Docket No. 21006, supra*, at 524. Accordingly, TCI was directed by the Field Operations Bureau to cease operations in the frequency bands 108-137 MHz and 225-400 MHz because such endangerment constitutes harmful interference as defined by §76.613 of the Rules. TCI complied by curtailing service in the relevant frequency bands.

Based upon the above facts, it appears that the TCI system has been radiating in excess of the Commission's standards and that this noncompliance threatened the Commission's regulatory goal of compatibility between the use of frequencies by cable television systems and various services in the same area. We note that TCI complied immediately with the staff's directive and has now eliminated the cited excessive signal leakage. However, such corrective action does not excuse TCI's initial failure to maintain the integrity of its cable distribution plant or relieve it of liability for such dereliction. In determining the amount of a forfeiture, we are guided by our recently adopted *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *reconsideration pending*. Under these standards, $12,500 is the base forfeiture for unauthorized signal emissions. Here, serious leakage problems in violation of § 76.605 were discovered on the first day of inspection. On the second day, the leakage measured was more severe and, in fact, exceeded the CLI criteria. We find this latter signal leakage violation to be a substantial aggravating factor, because of the serious threat to the public safety caused by such operation. *See Paragon Communications*, 4 FCC Rcd 8739 (MMB 1989). Consequently, because the violation was egregious, applying the standards, we are increasing the forfeiture to $23,750. The amount specified was determined after consideration of the factors set forth in §503(b)(2) of the Communications Act of 1934, as amended.

In regard to this forfeiture TCI may take any of the actions set forth in §1.80 of the Commission's Rules, as summarized in the attachment to this letter.

This letter was adopted by the Commission on September 17, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

APPENDIX I

TCI CABLEVISION OF MARYLAND, INC.; ELKTON, MD ET AL.

DATE	LOCATION	MICROVOLTS/METER
	Northeast, MD	
1/22/91	Red Toad Rd. @ Wells Camp Rd.	435
1/22/91	front of 531 Old Philadelphia Rd.	163
1/22/91	front of 4 W. Cecil Ave.	227
1/23/91	front of 210 Irishtown Rd.	2915
1/23/91	front of 88 Colonial Circle	259
1/23/91	Bay View Ave. @ Pulaski Hwy. beside entrance to car wash	195
1/23/91	pole between Johnnies Restaurant and Citgo gas gas station, Pulaski Hwy.	259
	Charlestown, MD	
1/22/91	front of 63 Edgewater Ave.	916
1/22/91	front of Town Hall, Market St.	227
1/23/91	front of 63 Edgewater Ave.	1047
1/23/91	Baltimore St. @ Ogle St.	243
1/23/91	Chesapeake Rd. @ Cecil Pkwy.	227
1/23/91	across from 539 Bladen St.	435
	Elkton, MD	
1/22/91	Augustine Herman Hwy @ Rene Carr St.	131
1/22/91	Road 1 at entrance to Hollingsworth Manor	564
1/22/91	near 343 Road C near Road 15, Hollingsworth Manor	169
1/22/91	front of 212 East Main St.	147
1/23/91	pole 25 Fletchwood Rd. behind 12 Cherry Lane	757
1/23/91	beside 264 Sycamore Rd.	597
1/23/91	behind 67 Willow Ct.	398

All measurements were made on 133.2625 MHz.

FOOTNOTE

[1] The provisions of §76.611 are applicable to all cable television systems which transmit carriers or other signal components carried at an average power level equal to or greater than 10^{-4} watts across a 25 MHz bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108-137 and 225-400 MHz for any purpose. TCI's signal use satisfies these conditions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-203

In re Applications of

KENNEDY BROADCASTING, INC.	File No. BPH-900125MQ
HBA BROADCASTING, INC.	File No. BPH-900125MT
MJR BROADCASTING LTD PARTNERSHIP	File No. BPH-900125MV
P.V.R. COMMUNICATIONS, L.P.	File No. BPH-900125MX
LITTLE RIVER COMMUNICATIONS GROUP, INC.	File No. BPH-900125MY

For Construction Permit for
New FM Station, Channel 299C2,
Martinez, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1991; Released: November 6, 1991

By the Review Board:

1. Before the Review Board is an "Appeal" of HBA Broadcasting, Inc. (HBA) seeking reinstatement of its application in this proceeding. HBA's application was dismissed for failure to timely tender its hearing fee by Administrative Law Judge Edward J. Kuhlmann (ALJ) in *Memorandum Opinion and Order*, FCC 91M-3129, released October 23, 1991.[1]

2. HBA is before the wrong forum. In the Commission's *Proposals to Reform the...Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 3403, 3409 (1991), applicants were directed to file "[a]ny requests for reconsideration of the dismissal of applications for fee defects . . . [with] the Commission's Managing Director." *Id.*, at Appendix A. In light of the foregoing, HBA's Appeal will be referred to the Commission's Managing Director. *See also CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990).

3. ACCORDINGLY, IT IS ORDERED, That the "Appeal" filed by HBA Broadcasting, Inc. on October 18, 1991 IS REFERRED to the Commission's Managing Director for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] By *Memorandum Opinion and Order*, FCC 91M-3058, released October 10, 1991, the ALJ approved a global settlement agreement amongst the remaining captioned applicants and terminated this proceeding. In the Commission's *Reform Order*, applicants were directed to pay their hearing fees (if their applications had been accepted for filing prior to July 1, 1991) "before midnight July 15, 1991" at the "Commission's lockbox bank in Pittsburgh, Pennsylvania", 6 FCC Rcd at 3408. However, purportedly relying on the previously-established provisions set forth in the Commission's *Establishment of a Fee Collection Program....*, 5 FCC Rcd 3558 (1990), "on July 15, 1991, counsel [for HBA] mailed the hearing fee to the Mellon Bank via the U.S. Postal Service Overnight Delivery Service." Appeal at para. 10. Thus, HBA's hearing fee was not received at the Commission's lockbox bank until, at least, July 16, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-315

In the Matter of

Amendment of Section 73.202(b), RM-7830
Table of Allotments,
FM Broadcast Stations.
(Perham, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1991; Released: November 5, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by John A. Brush, Yvonne M. Brush and Amy C. Rutledge ("petitioner"), requesting the allotment of FM Channel 258A to Perham, Minnesota, as that community's first local service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 258A can be allotted to Perham, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Perham is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a first local broadcast service to Perham, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Perham, Minnesota	---	258A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

John A. Brush
Yvonne M. Brush
Amy C. Rutledge
P.O. Box 4
Perham, Minnesota 56573

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 258A at Perham are 46-35-42 and 95-34-24.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-316

In the Matter of

Amendment of Section 73.202(b), RM-7834
Table of Allotments,
FM Broadcast Stations.
(Corrales, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1991; Released: November 5, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by LV Broadcasting Educational Foundation, Inc. ("petitioner"), requesting the substitution of Channel 236C1 for Channel 236A at Corrales, New Mexico, and the modification of Station KSVA's construction permit to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner states that it has been unable to obtain local zoning clearance for a tower to support its antenna taller than 26 feet, thus resulting in inadequate Class A service to Corrales. However, the substitution of Channel 236C1 for Channel 236A will enable the petitioner to utilize any one of several transmitter sites outside the jurisdiction of Corrales' zoning restrictions. Therefore, it submits that the allotment of Channel 236C1 to Corrales will serve the public interest by enabling Station KSVA to provide the community with enhanced service, as well as an expansion of the station's coverage area.

3. We believe the public interest would be served by proposing the substitution of Channel 236C1 for Channel 236A at Corrales, New Mexico, because it could provide the community with a wide coverage area FM service. Channel 236C1 can be allotted to Corrales in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.5 kilometers (15.2 miles) southwest to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station KSVA to specify operation on the higher class channel.[2] In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Corrales or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Corrales, New Mexico	236A	236C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald E. Martin, Esq.
Spencer W. Weisbroth, Esq.
Donald E. Martin, P.C.
2000 L Street, N.W., Suite 200
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b), of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding.

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[1] The coordinates for Channel 236C1 at Corrales are North Latitude 35-03-55 and West Longitude 106-46-27.

[2] Petitioner states that it will not commence operation on Channel 236C1 until Station KLLT, Channel 237A, Grants, New Mexico, has completed its move to Channel 279C. Station KLLT's license was modified to Channel 279C pursuant to the *Report and Order* in MM Docket 87-105. *See* 2 FCC Rcd 5240 (1987). However, on January 29, 1991, the Commission, under delegated authority, cancelled Station KLLT's license for Channel 237A and its construction permit for Channel 279C. Thus, there is no operation on Channel 237A at Grants which must be considered in this proceeding.

However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-170

In re Applications of

Tracy A. Moore d/b/a GIFFORD ORION BROADCASTING, LTD.	File No. BPH-880308MK
John E. Morris and Lawrence R. Baker d/b/a MORBAK COMMUNICATIONS	File No. BPH-880309ME
AMERIWAVE, INC.	File No. BPH-880309MF
JIANT BROADCASTING COMPANY, INC.	File No. BPH-880310ME
MOLLY BEARD BROADCASTING, LTD.	File No. BPH-880310MS

For Construction Permit for
New FM Station, Channel 234A,
Gifford, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1991; Released: November 8, 1991

By the Review Board:

1. The Mass Media Bureau has appealed Administrative Law Judge Frysiak's *Memorandum Opinion and Order*, FCC 91M-2739 (released Sept. 6, 1991) (*MO&O*), which approved four settlement agreements among the parties under the provisions of 47 C.F.R. § 73.3525(a) in effect on July 31, 1991. The Bureau asserts that the settlements must be governed by the amended provisions of 47 C.F.R. § 73.3525(a) that became effective on August 1, 1991, because the agreements were not filed with the Commission until August 1. All of the applicants in the proceeding have opposed the appeal and have filed a Contingent Request for Certification. Because the settlement agreements were not filed until the amendments to 47 C.F.R. § 73.3525(a) became effective and do not conform to the amended requirements, we are granting the Bureau's appeal and vacating the ALJ's *MO&O*. We also are denying the applicants' certification request.

2. Applicants Gifford Orion Broadcasting, Ltd., Morbak Communications, Ameriwave, Inc., Jiant Broadcasting Company, Inc., and Molly Beard Broadcasting, Ltd., executed settlement agreements and related documents on July 31, 1991, but filed only a few of the signature pages before the Commission's offices closed that day. The complete package allegedly reached the Commission a few minutes after closing. It was redelivered early on August 1 and followed later in the day with a Joint Motion to Accept Joint Request for Approval of Settlement Agreements *Nunc Pro Tunc*. The applicants' documents did not show that any consideration to be paid for settlement would be limited to the legitimate and prudent expenses of each applicant as required by amended section 73.3525(a). The ALJ interpreted language in 47 C.F.R. § 73.3525(a) requiring parties to file joint motions for acceptance of settlement agreements within five days of executing agreements as a grace period that tolled the applicability of payment limits for the applicants' settlement agreements. He granted the Joint Request *Nunc Pro Tunc* because the agreements had been executed before the amended rule took effect.

3. The Bureau asserts that the critical date for determining the applicability of amended section 73.3525(a) is the date the applicants filed the agreements with the Commission, not the date they entered into them. Thus, the Bureau argues, the ALJ should be instructed to deny the joint request unless the applicants submit the documentation now required regarding limited payments to dismissing applicants under amended section 73.3525(a)(3), (5). *See* also section 73.3525(a)(4),(6), which requires the applicants to state the nature of any consideration paid or promised or to disclose the terms of any oral agreements they may have made governing the dismissal of the applications.

4. In opposing the Bureau's appeal, the applicants argue that the Commission's *Memorandum Opinion and Order, Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 2901 (1991) (Docket 90-263), which revised the effective date for amended section 73.3525(a), required only that settlement agreements be concluded by July 31, 1991. It did not mention the need to file documentation by that date.[1] In their Contingent Request for Certification, the applicants further assert that the ALJ correctly applied the five-day filing requirement of section 73.3525(a) as a grace period for filing their agreements under the former provisions of the rule. But even if the rule did not give them a grace period, the applicants argue, the ALJ could have found that the applicants substantially complied with section 73.3525, that the documents filed on August 1, 1991, merely supplemented the signature pages filed July 31, or that a waiver would be warranted consistent with the public interest considerations favoring settlements.

5. We will grant the Bureau's appeal and deny the applicants' Contingent Request for Certification. The Commission has made clear its intention to apply the limit on settlement payments under amended section 73.3525(a) to settlements filed on August 1, the effective date of the amendments. *SBM Communications, Inc.*, FCC 91-288 (released Sept. 25, 1991) (waiver of amended rule denied where all but one party to a universal settlement had finalized settlement negotiations by 5:30 p.m. on July 31 and settlement was filed August 1).

6. Although the applicants assert that they had no notice that the settlement agreements had to be filed as well as completed before August 1, the Commission made clear in its *Report and Order, Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85, 87 ¶ 13 (1990) (Docket 90-263), that:

> as of the effective date of the new rules, March 21, 1991, the settlement payment limitations will apply to all applications, including those which are pending at that point. Any settlement agreements filed before this date will be considered under our former rules and policies.

On reconsideration the Commission changed the effective date to August 1, giving the applicants more than four additional months to reach and file their settlements. *Memorandum Opinion and Order* (*Docket 90-263),* 6 FCC Rcd 2901 (1991). The applicants were on notice from the *Report and Order* that settlements filed after the the effective date would be considered under the amended rule limiting settlements to the dismissing applicants' reasonable and prudent expenses. Although the Commission did not repeat itself when it changed the effective date after reconsidering and clarifying other points, this lack of repetition does not negate the notice given to the applicants in the *Report and Order.*[2]

7. The five-day period provided by section 73.3525(a) for filing joint requests for approval after settlement agreements have been reached does not negate the Commission's intent that filings made on or after August 1, 1991, include the showing now required by the amendments to section 73.3525(a). The applicants may not effectuate a settlement agreement without prior Commission approval, and the Commission is required to specify by rule the information it needs for its review under the public interest standard. 47 U.S.C. § 311(c). Section 73.3525 both provides for timely notice of settlement agreements that resulted in the dismissal of mutually exclusive applications and elicits the information the Commission needs to determine whether a settlement agreement is in the public interest. *See Dismissal of Applications by Agreement,* 20 RR 1669, 1670 ¶ 5 (1961) (the rule originally was in § 1.316 of the Commission's rules). The fact that the Commission allows applicants five days to give notice of settlements does not and should not affect the Commission's authority to implement changes in the public interest showing it requires of applicants, even if such changes take effect after applicants reach agreements but before they file with the Commission. (The rule was amended after a notice and comment Rule Making under section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.) Although the Commission certainly could have suspended the amendment's effective date to accommodate situations like the one in this case, it did not, and an intention to provide special treatment for the applicants' situation should not be read into the long-standing requirement that applicants notify the Commission of settlement agreements within five days of entering into the agreements. The ALJ's reliance on this five-day filing requirement as a grace period that tolled the effectiveness of amended section 73.3525(a) was error.[3]

8. ACCORDINGLY, IT IS ORDERED That the Request for Waiver of Section 1.301(C)(7) Page Limitation filed by Gifford Orion Broadcasting, Ltd., Morbak Communications, Ameriwave, Inc., Jiant Broadcasting Company, Inc., and Molly Beard Broadcasting, Ltd., on September 25, 1991, IS GRANTED;

9. IT IS FURTHER ORDERED That the Mass Media Bureau's Appeal filed September 13, 1991, IS GRANTED, the Administrative Law Judge's *Memorandum Opinion and Order*, FCC 91M-2739 (released Sept. 6, 1991), IS VACATED, and this proceeding IS REMANDED to the presiding officer for further action not inconsistent with this order;

10. IT IS FURTHER ORDERED That the Contingent Request for Certification filed by Gifford Orion Broadcasting, Ltd., Morbak Communications, Ameriwave, Inc., Jiant Broadcasting Company, Inc., and Molly Beard Broadcasting, Ltd., on September 27, 1991, IS DENIED; and

11. IT IS FURTHER ORDERED That the applications of Gifford Orion Broadcasting, Ltd. (File No. BPH-880308MK), Morbak Communications (File No. BPH-880309ME), Ameriwave, Inc. (File No. BPH-880309MF), and Jiant Broadcasting Company, Ltd. (File No. BPH-880310ME), ARE REINSTATED in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

FOOTNOTES

[1] The applicants note that the summaries of the Commission's actions appearing in the *Federal Register* on January 4, 1991 (amendments to section 73.3525 adopted, 56 Fed. Reg. 373) and June 19, 1991 (amendments reconsidered, 56 Fed. Reg. 28,096) did not include information about documents to be filed or filing deadlines for settlements that would be considered under the former rule. They further note that the Commission's reconsideration decision did not mention the need to file settlement documents before the effective date of the amended rule. The *Memorandum Opinion and Order* stated only that the settlement limits would apply to all applications pending on August 1 and "[p]ending applicants . . . can settle without any limits before the effective date of the new rules adopted herein." 6 FCC Rcd at 2902.

[2] The Commission's release and *FCC Record* publication of the *Report and Order* and the *Memorandum Opinion and Order* in Docket 90-263 is sufficient notice to the public of the need to file the settlement agreements and the revised effective date of the revised rule. Matters such as these are deemed to be published in the *Federal Register* when they are made "reasonably available to the class of persons affected thereby" and incorporated by reference in the *Federal Register*, as the Commission did with the texts of its decisions adopting and reconsidering the rules in Docket 90-263. *See* 5 U.S.C. § 552(a)(1).

[3] We do not agree with the applicants that the ALJ could have found substantial compliance. We view their substantial compliance argument as an argument that the ALJ could have granted a waiver. However, the Commission clearly stated its disinclination to waive the effective date in *SBM Communications, Inc.*, FCC 91-288 (released Sept. 25, 1991), under facts similar to those in this case. As the Board pointed out in its decision in *SBM Communications, Inc.*, 6 FCC Rcd 5021 (Rev. Bd. 1991) at para. 5, the Commission has not set forth a waiver policy. Unless the Commission does so, it would be as presumptuous for an ALJ to set aside the Commission's deadline for unlimited monetary settlements as it would be for the Board to do so.

We also do not agree with the applicants that the filing of the settlement package on August 1 was merely a supplement to the signature pages filed on July 31. The applicants do not claim

that all of the signature pages were filed, and they admit that the signature pages were not sufficient to apprise the Commission of even the fact of the settlement agreement. Although they claim that they served the settlement package on the parties and the ALJ on July 31, this service does not meet the Commission requirement that the settlement package be filed with the Commission by July 31 to qualify for consideration under the former provisions of section 73.3525.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L. Baker d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC.	File No. BPH-860703MH

For Construction Permit for
New FM Station, Channel 275A,
Raleigh, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1991; Released: November 6, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. By *Memorandum Opinion and Order*, FCC 91R-90, released October 17, 1991 (MO&O), the Review Board remanded this proceeding, specifying basic qualifications issues against applicants Peebles Broadcasting Company and Interactive Media. On October 22, 1991, these applicants (along with REM Malloy Broadcasting) filed a document styled "Joint Motion for Clarification of Memorandum Opinion and Order" claiming that they are "uncertain" concerning the disposition of the application of another applicant (Bernard Dawson) because "the Board did not address the exceptions to Dawson's financial qualifications" in the MO&O.

2. The parties' joint motion is, in essence, a petition for reconsideration of the Board's MO&O. As such, the joint motion will not be entertained and will be dismissed. *See* 47 CFR § 1.102(b)(2) ("Petitions for reconsideration of interlocutory actions will not be entertained"); 47 CFR § 1.106(a)(1) ("Petitions for reconsideration of [non-final] interlocutory actions will not be entertained"); and 47 CFR § 1.291(c)(3) ("Petitions requesting reconsideration of an interlocutory ruling made by . . . the Review Board . . . will not be entertained"); *see also Roxanne Givens*, 5 FCC Rcd 7010 (Rev. Bd. 1990).

3. Nevertheless, we note in passing that the joint movants concede that a financial issue was designated against Dawson, an appropriate hearing was held, the issue was fully briefed in pending exceptions before the Board, and the matter was addressed at oral argument on September 6, 1991. Thus, the extant exceptions will be timely addressed in our ultimate *Decision* in this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That the "Joint Motion" filed by REM Malloy Broadcasting, Interactive Media, and Peebles Broadcasting Co., on October 22, 1991, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-124

In the Matter of

Amendment of Section 73.202(b), RM-7586
Table of Allotments,
FM Broadcast Stations.
(Bentonville, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1991; Released: November 5, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 2215 (1991), proposing the substitution of Channel 252C3 for Channel 252A at Bentonville, Arkansas, and modification of the license of Demaree Media, Inc. ("petitioner"), for Station KOLZ(FM) accordingly. Petitioner filed supporting comments. No other comments were received.

2. As stated in the *Notice*, although petitioner also owns Station KKEG(FM), Channel 221C3, Fayetteville, Arkansas,[1] it provided engineering data demonstrating that the proposed modification of Station KOLZ(FM) can be accomplished without prohibited overlap of the 3.16 mV/m contours of the two stations.[2]

3. We believe the public interest would be served by substituting Channel 252C3 for Channel 252A at Bentonville since it could enable Station KOLZ(FM) to provide an expanded coverage area FM service to the community. Channel 252C3 can be allotted to Bentonville at the petitioner's suggested site, located 16.8 kilometers (10.4 miles) north of the community,[3] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[4] As stated in the *Notice* and pursuant to petitioner's representations, petitioner is expected to submit an application specifying facilities for Station KOLZ(FM) that will avoid prohibited overlap of the 70 dBu contours of its commonly-owned stations at Fayetteville and Huntsville, Arkansas. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Demaree Media, Inc. for Station KOLZ(FM) to specify operation on Channel 252C3 in lieu of Channel 252A at Bentonville, Arkansas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Bentonvile, Arkansas	252C3

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to Saturn Communications, Inc., Radio Station KOCD(FM), 3001 W. 13th Street, Joplin, MO 64802.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Demaree Media, Inc. for Station KOLZ(FM), Bentonville, Arkansas, IS MODIFIED to specify operation on Channel 252C3 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Demaree Media, Inc., licensee of Station KOLZ(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

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[1] Station KKEG(FM) is presently operating on Channel 221A. Its license was modified in MM Docket No. 90-201 to specify operation on Channel 221C3, for which it holds a construction permit (File No. BPH-910816IE). *See* 6 FCC Rcd 1950 (1991). Demaree is also the licensee of Station KFAY-FM, Channel 225A, Huntsville, Arkansas.

[2] *See* 47 C.F.R. § 73.3555(a)(2).

[3] Coordinates at the petitioner's suggested site for Channel 252C3 are 36-31-08 and 94-10-38.

[4] As stated in the *Notice*, we recognize that the allotment of Channel 252C3 at Bentonville conflicts with the presently licensed operation of Station KOCD(FM) on Channel 252A at Columbus, Kansas. However, Station KOCD(FM) has been modified to specify Channel 287C3, and it has been issued a construction permit for the new channel (File No. BPH-910506IF). *See* 5 FCC Rcd 6175 (1990). A copy of this *Order* will be served on Station KOCD(FM).

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 6, 1991

NYNEX FILES REVISIONS TO ITS COST ALLOCATION MANUAL

On October 29, 1991, the NYNEX Telephone Companies filed proposed revisions to its cost allocation manual for the separation of regulated and nonregulated costs. NYNEX proposes to reduce the number of cost pools in Account 2121, Buildings. Interested parties may file comments on the proposed revisions by **December 6, 1991.** Replies should be filed by **December 23, 1991.** Comments should reference AAD 91-71. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1114 21st St., N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 91-313

In the Matter of

Conformance of FCC Regulations
with International Standards
for ISM Equipment

NOTICE OF INQUIRY

Adopted: October 22, 1991; Released: November 6, 1991

Comment Date: March 13, 1992
Reply Comment Date: April 13, 1992

By the Commission:

INTRODUCTION

1. The purpose of this inquiry is to solicit information from interested parties to assist the Commission in shaping its position on international standards to control radio noise generated by Industrial, Scientific, and Medical (ISM) equipment. The Commission also seeks information about the desirability and feasibility of harmonizing Part 18 of the FCC Rules (47 CFR Part 18) with the international standards for ISM equipment.

BACKGROUND

2. ISM equipment is defined by the Commission as equipment or appliances designed to generate and use radio frequency (RF) energy to perform some work, other than telecommunications. Examples of such equipment include: dielectric heaters used for plastic sealing in the manufacture of commercial goods and for wood gluing; induction heaters used for welding pipes; medical diathermy and electrosurgical equipment; industrial microwave heaters used for commercial food processing and for manufacture of fiber optic cables; domestic microwave ovens; ultrasonic cleaning equipment; and, medical diagnostic equipment. Part 18 of the FCC Rules contains requirements designed to control potential interference to radio communications from ISM equipment. Briefly, the rules provide eleven frequency bands where ISM equipment may operate without any restriction on emissions.[1] These are known as the ISM bands. While certain radio services share the ISM bands, they must operate on a secondary basis to ISM equipment. ISM equipment may also operate outside the ISM bands, subject to limits on the levels of emissions. The equipment must either be verified by the manufacturer as complying with the limits or certificated by the Commission, as called out in Part 18 for the various types of equipment.[2] Irrespective of compliance with the limits, any harmful interference caused by ISM equipment to radio services outside the ISM bands must be corrected.

3. In 1979, the World Administrative Radio Conference (WARC-79), adopted Resolution 63, which, *inter alia*, directed the International Radio Consultative Committee (CCIR)[3] to produce recommendations, in conjunction with the International Special Committee on Radio Interference (CISPR)[4] for controlling RF emissions from ISM equipment both within and outside the designated ISM bands. These recommendations could ultimately be incorporated into the international Radio Regulations and could be made mandatory through treaty agreements. Since 1980, the CCIR and the CISPR have been working together to develop recommendations. The first major step in this process was achieved in September, 1990, with the release of the Second Edition of CISPR Publication 11, [5] which establishes recommended limits and measurement methods for ISM equipment on frequencies outside the ISM bands. Although not presently accepted by the CCIR, we anticipate that the standards in CISPR Publication 11 will be considered for adoption as a CCIR recommendation in the near future and subsequently considered for incorporation in the international Radio Regulations. We also anticipate that the European Community (EC), and perhaps other foreign administrations will implement the CISPR Publication 11 standards.

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[1] The frequency bands allocated for use by ISM equipment within the United States are 6.765-6.795 MHz, 13.553-13.567 MHz, 26.957-27.283 MHz, 40.66-40.70 MHz, 902-928 MHz, 2400-2500 MHz, 5725-5875 MHz, 24000-24250 MHz, 61000-61500 MHz, 122000-123000 MHz, and 244000-246000 MHz.

[2] Verification and certification are equipment authorization procedures established by the FCC to promote compliance. See 47 CFR 2.901 *et seq*. Verification requires the manufacturer to test the equipment and to retain measurement and other data demonstrating compliance with the limits. Certification requires a grant of equipment authorization to be issued by the FCC. Both procedures are a prerequisite for marketing of the equipment, pursuant to 47 CFR 2.801 *et seq*.

[3] The CCIR is one of two committees under the International Telecommunications Union (ITU) that provides technical recommendations on telecommunication matters. Its membership consists of national administrations, scientific and industrial organizations, and recognized private operating agencies. Recommendations developed by the CCIR are sometimes incorporated into the international Radio Regulations of the ITU.

[4] The CISPR is an international voluntary standards making organization under the auspices of the International Electrotechnical Commission. Its recommendations for controlling the interference from various electrical devices are developed by national committees and are often adopted as national electromagnetic interference requirements.

[5] CISPR Publication 11, Second Edition, 1990-09, *Limits and methods of electromagnetic disturbance characteristics of industrial, scientific and medical (ISM) radio-frequency equipment*, ($60.00). CISPR Publications are available from the International Electrotechnical Commission, 3 rue de Varambe, Case Postale 131, CH-1211, Geneve 20, Switzerland/Suisse. In the U.S.A., CISPR Publications are available from the Sales Department, American National Standards Institute, 11 W. 42nd Street, New York, NY 10036, telephone (212) 642-4900.

DISCUSSION

4. International developments on standards to control interference from ISM equipment make it appropriate at this time to examine potential ramifications and possible future courses of action for the United States. We have two principal objectives in initiating this proceeding. First, we seek to gather information that will be useful to the Commission in establishing positions with regard to the CCIR and CISPR activities.[6] The Commission staff has worked with ISM manufacturers, communications interests, and other parties in the ISM work conducted by CCIR and CISPR. However, the number of ISM industry participants have been few. This proceeding highlights the importance of this matter and provides a formal opportunity for all parties to state their views. Second, we seek information that would help the Commission formulate changes to its regulations to conform to international standards for ISM equipment if it should appear that this is an appropriate course to follow.

5. Listed below are a number of items and issues where we believe information would be particularly useful. In responding to many of the questions listed, a careful study of CISPR Publication 11 will be required. Accordingly, a copy of the document will be placed in the record. Additionally, in order to assist prospective respondents, we have provided a comparison of FCC Part 18 and CISPR Publication 11 provisions in an Appendix to this Notice.

6. *Current and Planned ISM Usage.* In order to understand the potential impact of any changes in the standards for ISM equipment, it is vital that we have as complete an understanding as possible of the nature of the ISM industry and the industries that use this equipment. We are generally familiar with ISM equipment and its characteristics, however, we would like to have as up-to-date information as possible. Accordingly, we solicit responses to the following questions:

Q1 What are the quantities of various types of ISM equipment currently in use?

Q2 What new types of ISM equipment are anticipated in the future?

Q3 What are the technical characteristics of the various ISM equipment? Specifically, state the operating frequencies, emission bandwidths and the power levels that are used.

Q4 What industries rely on the use of ISM equipment? We are specifically interested in the impact on U.S. competitiveness if there were to be an increase in cost in ISM equipment as a result of conformance with international standards.

Q5 To what extent is ISM equipment traded internationally? How would conformance with international ISM standards benefit the U.S.? What costs or burdens would result if the FCC were to retain its current standards, in lieu of the international CISPR standards?

7. *Scope of Part 18 vs. CISPR Publication 11.* There are a number of differences between Part 18 and CISPR Publication 11 with regard to the equipment they cover. CISPR Publication 11 covers all equipment that generates and/or uses RF energy for industrial, scientific, medical, domestic or similar purposes. In contrast, Part 18 covers only industrial, scientific, or medical equipment that generates RF energy and applies that energy to perform work.[7] These differences between the scope of Part 18 and CISPR Publication 11 have several important ramifications. First, the CISPR Publication 11 standards apply to many pieces of equipment that have not been considered ISM equipment in the United States. For example, electronic test equipment, industrial process control equipment, chemical analysis machines, and blood pressure, heart monitor and other medical instruments, are all covered by Publication 11 but are not considered ISM equipment under Part 18. Thus, many parties in the U.S. that manufacture such equipment may not have heretofore been aware of how the international standards activity on ISM equipment might affect them. Further, certain consumer ISM equipment now covered by Part 18, such as RF lighting equipment, is not considered ISM equipment under Publication 11. In light of this situation, we invite responses to the following questions:

Q6 Would it be desirable for the FCC to revise the scope of Part 18 in line with Publication 11? How can we avoid confusion in light of different U.S. and international definitions of ISM equipment?

Q7 Should any of the equipment included within the scope of CISPR Publication 11 be exempted from FCC technical standards?

Q8 Should we continue to include in Part 18 equipment that is not considered ISM equipment by CISPR, such as RF lighting products?

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[6] U.S. positions in either the CCIR or the CISPR are established through consultation among the Department of State, the FCC and the National Telecommunications and Information Administration (NTIA). In addition, the private sector can provide direct input to the U.S. CCIR preparatory working groups which advise the Department of State. U.S. positions in CISPR are formulated through the private sector under the auspices of the American National Standards Institute (ANSI). ANSI has established a technical advisory group (TAG) for CISPR on ISM matters, which includes ISM manufacturers and users, as well as representatives from the FCC and NTIA. The FCC plays a prominent role within the U.S. in both areas because of its spectrum management responsibility and regulatory authority. Further, the FCC is in a unique position to balance the need to control interference against the impact that unnecessarily stringent standards may have on ISM equipment manufacturers and users.

[7] Equipment that does not fall under the Part 18 definition of ISM equipment is governed by restrictions in Part 15 of the FCC Rules, which regulates the interference potential of electronic equipment. However, most Part 15 equipment having industrial, scientific and medical applications is exempt from specific technical standards under 47 CFR Section 15.103 and is subject only to the requirement that such equipment operate on a non-interference basis.

8. *Part 18 vs. CISPR Publication 11 Limits.* The Part 18 standards were developed almost forty years ago. Despite the vast expansion in the use of radio over this period, these standards, coupled with the user requirement to correct harmful interference problems, have served well to control interference. We generally receive an average of only 100 complaints a year of interference caused by ISM equipment. The CISPR Publication 11 standards are based upon analysis of current radio communications systems and their ability to tolerate interference. The FCC, for its part, and other U.S. ISM interests have provided substantial information to CISPR and CCIR on the successful experience with the FCC standards. This experience and the associated technical arguments led to CISPR Publication 11 limits that are less stringent than those advocated by many foreign administrations. In any case, direct comparison of the CISPR Publication 11 limits and Part 18 limits is not straightforward. For example, because CISPR Publication 11 and Part 18 specify limits at substantially different measurement distances from the ISM equipment, the assumptions one uses for propagation are critical. Both the Part 18 and the CISPR Publication 11 limits are provided in the Appendix along with what we believe is a reasonable comparison. Depending on the type of equipment and frequency of operation, the CISPR Publication 11 limits are generally 10 to 15 dB more stringent, but in some cases are as much as 40 dB more strict. In other cases the CISPR limits are about the same as or slightly less stringent than the Part 18 limits. In light of this situation, we solicit the following information:

Q9 Based on a review of CISPR Publication 11 and Part 18, what is the feasibility of satisfying the CISPR limits? What would be the costs of compliance? Are there situations where cost would be so excessive as to eliminate use of certain ISM equipment? These questions should be considered in the context that other countries will be implementing these standards so that compliance appears to be possible.

Q10 If complete compliance with the CISPR limits does not appear feasible, might it be possible to achieve partial compliance? For example, would it be feasible to meet the CISPR limits in frequency bands used for safety communications? Would it be possible to meet the *in situ* limits but not the limits when measurements are performed on a test site? [8] If partial compliance is feasible, describe how.

Q11 CISPR Publication 11 contains different limits depending on the operating environment, such as industrial vs. commercial or business, and on whether the equipment generates RF energy for internal use or to perform work. Are these divisions appropriate?

Q12 Given that WARC-79 Resolution 63 calls for recommendations on limits within the ISM bands, what limits are appropriate? What levels of emissions in the ISM bands are typical of current equipment?

9. *Administrative Considerations.* Discussions within the CCIR and CISPR have highlighted the fact that the impact of limits cannot be evaluated without also considering the administrative requirements associated with their implementation. Each administration has considerable latitude in how it applies and enforces standards. Depending on the circumstances, a strict standard may be more acceptable if it were only applied under limited situations, such as to resolve interference disputes. This is the approach that has been taken in the past by some foreign administrations. In contrast, where regulations require that each product be tested and authorized as meeting a standard, a strict standard can become more burdensome. Therefore, we solicit responses to the following questions:

Q13 Would the CISPR standards be more acceptable if they were implemented in ways other than the current FCC regulatory approach, i.e., testing and authorization of the equipment? Suggest alternatives.

Q14 For certain high volume equipment, compliance with the CISPR limits is intended to be determined on a statistical basis using measurements on multiple units of the same equipment. Under the current FCC requirements, each piece of equipment must meet the appropriate limits specified in the rules. No allowance is made for production variations in the rules. Should the FCC adopt a statistical compliance standard such as in CISPR Publication 11?

Q15 If the international limits were implemented by the FCC should we exempt all existing ISM equipment? If not, what period should be allowed for existing equipment to come into compliance? How much time should we allow before newly manufactured equipment must come into compliance?

PROCEDURAL MATTERS

10. This *Notice of Inquiry* is issued pursuant to authority contained in Sections 4(i), 303 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before **March 13, 1992,** and reply comments on or before **April 13, 1992.** All relevant and timely comments will be considered by the Commission before taking further action in this proceeding. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information concerning this *Notice of Inquiry,*

[8] The term *in situ* refers to a compliance determination at a given site for a particular piece of equipment.

contact Richard Engelman, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554, telephone 202-653-6288.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

COMPARISON OF FCC PART 18 AND CISPR 11

DEFINITION OF ISM EQUIPMENT

FCC Section 18.107(c): "Equipment or appliances designed to generate and use locally RF energy for industrial, scientific, medical, domestic or similar purposes, excluding applications in the field of telecommunication. Typical ISM applications are the production of physical, biological, or chemical effects such as heating, ionization of gases, mechanical vibrations, hair removal and acceleration of charged particles."

CISPR 11 Clause 2.1: "ISM qualifies equipment or appliances designed to generate and/or use locally radio frequency energy for industrial, scientific, medical, domestic or similar purposes, excluding applications in the field of telecommunications and information technology and other applications covered by other CISPR publications."

SCOPE

o FCC Section 18.309 - Range of frequency measurements is 9 kHz to 10th harmonic or highest detectable emission.

CISPR Clause 1.3 - Limits are specified within the frequency range 9 kHz to 400 GHz.

o FCC Part 18 includes RF lighting as ISM devices, CISPR Publication 11 does not.

o FCC does not specify conformity assessment standards.

CISPR Clause 1.2 - Assessment of conformity; e.g., for equipment in series production, there shall be 80% confidence that at least 80% of manufactured items comply with the limits given.

o FCC - Section 18.121 exempts non-consumer ultrasonic equipment from technical requirements.

IN-BAND LIMITS FOR FREQUENCIES DESIGNATED BY ITU FOR ISM USE

COMPARISON OF FCC AND CISPR 11 IN-BAND LIMITS

Frequency range MHz	Tolerance (+/-)	Maximum radiation limit CISPR	Maximum radiation limit FCC Part 18
6.78	15 kHz	Under consideration	Unrestricted
13.56	7 kHz	Unrestricted	"
27.12	163 kHz	"	"
40.68	20 kHz	"	"
915	13 MHz	"	"
2,450	50 MHz	"	"
5,800	75 MHz	"	"
24,125	125 MHz	"	"
61,250	250 MHz	Under consideration	"
122,500	500 MHz	Under consideration	"
245,000	1 GHz	Under consideration	"

CLASSIFICATION OF ISM EQUIPMENT

CISPR 11 Clause 4.1 - Separation into groups

Group 1 contains all ISM equipment in which there is intentionally generated and/or used conductively coupled radio frequency energy which is necessary for the internal functioning of the equipment itself.

Group 2 contains all ISM equipment in which radio frequency energy is internally generated and/or used in the form of electromagnetic radiation for the treatment of material, and spark erosion equipment.

CISPR 11 Clause 4.2 - Division into classes

Class A equipment is equipment suitable for use in all establishments other than domestic and other than those directly connected to a low voltage power supply network which supplies buildings used for domestic purposes.

Class B equipment is equipment suitable for use in domestic establishments and in establishments directly connected to a low power supply network which supplies buildings used for domestic purposes.

FCC does not use a classification system. Part 18 does differentiate between consumer and non-consumer uses for RF lighting emission limits. Also, Part 18 consumer ISM equipment must be certified while non-consumer ISM is verified, except for consumer ultrasonic equipment generating less that 500 watts and operating below 90 kHz which is also subject to verification.

Part 18 does not cover equipment that uses conductively coupled energy which CISPR 11 calls Group 1 equipment. CISPR 11 lists as examples of Group 1 equipment signal generators, measuring receivers, frequency counters, flow meters, spectrum analyzers, weighing machines, chemical analysis machines, electronic microscopes, and switched mode power supplies (when not incorporated in an equipment). The FCC considers these types of equipment to be digital devices that are regulated under 47 CFR Part 15. For the most part, this equipment is exempt from complying with the digital

device technical standards pursuant to Section 15.103, which exempts devices used exclusively as industrial, commercial, or medical test equipment, specialized medical digital devices, or as an electronic control or power system used by a public utility or in an industrial plant.

RADIATION LIMITS

FCC Part 18 has limits for arc welders and medical diathermy equipment. CISPR limits are under consideration for RF excited arc welding equipment, radiology equipment, and RF surgical diathermy equipment.

Conducted Emissions Limits

FCC Part 18 specifies conducted emissions limits for ultrasonic equipment, induction cooking ranges, and RF lighting devices only. Part 18 specifies that a 5 uH/50 ohm line impedance stabilization network (LISN) and an average detector are to be used for ultrasonic equipment and induction ranges, while a 50 uH/50 ohm LISN and quasi-peak detector are used for RF lighting measurements.

CISPR 11 specifies conducted radiation limits for all ISM equipment except for Class A (non-domestic) equipment measured in situ. (Limits are still under consideration for Class A equipment requiring currents greater than 100 A.) Measurements are to be made with a 50 uH/50 ohm LISN and limits are specified for both average and quasi-peak detectors. The equipment under test should meet either:

i) both the average limit specified for measurements with an average detector receiver and the quasi-peak limit specified for measurements with a quasi-peak detector; or

ii) the average limit when using a quasi-peak detector receiver.

The following tables compare Part 18 conduction limits for ultrasonic equipment and induction ovens to the CISPR average limits. No comparison is shown for RF lighting equipment since it is not covered by CISPR 11. Correction factors for the FCC-specified 5 uH LISN's were taken from Figure 4 of the 1982 version of FCC Measurement Procedure MP-3.

ULTRASONIC EQUIPMENT
CONDUCTED EMISSIONS LIMITS

FCC Part 18		CISPR 11	
Frequency band MHz	Max. line voltage dB(uV)	Frequency band MHz	Class B (domestic) dB(uV)
0.010 - 0.49	60	0.15 - 0.50	56 - 46 (1)
0.49 - 30	46 - 51 (2)	0.50 - 5	46
		5 - 30	50

(1) Decreases with logarithm of frequency
(2) Correction factors for conversion of 5 uH LISN readings to equivalent 50 uH values are dependent on measurement frequency

INDUCTION COOKING RANGES
CONDUCTED EMISSIONS LIMITS

FCC Part 18		CISPR 11		
Frequency band MHz	Max. line voltage dB(uV)	Frequency band MHz	Class A (Non-domestic) dB(uV)	Class B (domestic) dB(uV)
0.010 - 0.1	80 - 60 (3)			
0.1 - 0.5	60	0.15 - 0.50	90	56 - 46 (1)
0.5 - 30	48 - 53 (2)	0.50 - 5	76	46
		5 - 30	80 - 60 (1)	50

(1) Decreasing with logarithm of frequency
(2) Correction factors for conversion of 5 uH LISN readings to equivalent 50 uH values are dependent on measurement frequency
(3) Linear interpolation

Radiated Field Strength Limits

I. Group 1 ISM equipment - conductively coupled RF energy for internal functioning.

The following two tables can be used to compare FCC and CISPR limits for digital devices such as industrial, scientific, and medical test equipment. However, the FCC generally exempts such equipment from the digital device limits pursuant to Section 15.103, as noted above.

CISPR 11 Group 1 - Conductively Coupled Equipment

Frequency band MHz	Class A - Non-domestic dB(uV/m) at 30 m	Class B - Domestic dB(uV/m) at 10 m
0.15 - 30	Under consideration	Under consideration
30 - 230	30	30
230 - 1000	37	37

FCC Part 15 Digital Device Limits

Frequency band MHz	FCC Class A dB(uV/m) at 30 m	FCC Class B dB(uV/m) at 10 m
30 - 88	30	30
88 - 216	34	33
216 - 960	37	36
Above 960	40	44

II. CISPR Group 2 equipment - intentionally generated RF energy.

Part 18 does not have separate radiated emission limits for consumer and non-consumer equipment except for RF lighting which is not being considered in this comparison. Part 18 does specify different field strength limits for different types of equipment.

CISPR Group 2 Class B (Domestic) Limits

Frequency range MHz	Limits at 10 m in dB(uV/m)
0.15 - 30	Limits under consideration
30 - 80.872	30
80.872 - 81.848	50
81.848 - 134.786	30
134.786 - 136.414	50
136.414 - 230	30
230 - 1000	37

CISPR Group 2 Class A (Non-domestic) Limits

Frequency range MHz	Limits at 30m from external wall of building dB(uV/m)	Limits at 30m on a test site dB(uV/m)
0.15 - 0.49	75	85
0.49 - 1.705	65	75
1.705 - 2.194	70	80
2.194 - 3.95	65	75
3.95 - 20	50	60
20 - 30	40	50
30 - 47	48	58
47 - 68	30	40
68 - 80.872	43	53
80.872 - 81.848	58	68
81.848 - 87	43	53
87 - 134.786	40	50
134.786 - 136.414	50	60
136.414 - 156	40	50
156 - 174	54	64
174 - 188.7	30	40
188.7 - 190.979	40	50
190.979 - 230	30	40
230 - 400	40	50
400 - 470	43	53
470 - 1000	40	50

FCC Radiated Emission Field Strength Limits

Equipment	Operating frequency	RF Power (watts)	Max Field Strength uV/m	Dist. m
Miscellaneous	Any ISM	Below 500	25	300
		500 or more	10	1600
	Any non-ISM	Below 500	15	300
		500 or more	10	1600
Industrial Heaters & and arc welders	On or below 5725 MHz	Any	10	1600
	Above 5725 MHz	Any	(1)	(1)
Medical diathermy	Any ISM	Any	25	300
	Any non-ISM	Any	15	300
Ultrasonic	Below 490 kHz	Below 500	2,400/F(kHz)	300
		500 or more	10	1600
	490-1600 kHz	Any	2,400/F(kHz)	300
	Above 1600 kHz	Any	15	30
Induction cooking ranges	Below 90 kHz	Any	1,500	30
	On or above 90 kHz	Any	300	30

(1) Reduced to the greatest extent possible.

The following table contains the Part 18 limits converted to dB's at 30 m, using CISPR attenuation factors, for direct comparison with CISPR limits.

FCC Field Strength Limits Expressed in dB(uV/m) at 30 Meters

Frequency range (MHz)	25 uV/m 300 m	10 uV/m 1600 m	15 uV/m 300 m	Attenuation Law Factor
0.15 - 0.285	82	113	78	-2.7
0.285 - 0.49	84	117	80	-2.8
0.49 - 1.605	82	113	78	-2.7
1.605 - 68	68	89	64	-2
68 - 156	48	55	44	-1
156 - 216	64	82	60	-1.8
216 - 400	48	55	44	-1
400 - 470	64	82	60	-1.8
470 - 585	54	65	50	-1.3
585 - 614	48	55	44	-1
614 - 854	54	65	50	-1.3

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: November 6, 1991

Peter J. Jorgenson
Executive Vice-President & General Manager
Villcom Broadcasting, Inc.
P.O. Box 33396
Raleigh, North Carolina 27636

Re: Application for Renewal of
License for Station WZZU(FM)
Burlington, North Carolina

Dear Mr. Jorgenson:

This refers to your pending application for renewal of the license of Station WZZU(FM), Burlington, North Carolina (File No. BRH-880801ZP). The North Carolina State Conference of Branches of the NAACP, the Alamance County Branch of the NAACP, the North Carolina Central University Chapter of the NAACP, and the National Black Media Coalition filed a petition to deny on November 1, 1988. By letter dated November 22, 1988, the petitioners moved to withdraw the petition and requested that the Commission renew your license. Nonetheless, it is our practice in all cases to review the station's Equal Employment Opportunity (EEO) program and performance pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Section 309. Review of the EEO record of WZZU(FM) for the license term reflects a failure to comply with the Commission's EEO Rule. Accordingly, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this letter also constitutes a Notice of Apparent Liability for Forfeiture.

Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee.

When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing if the facts so warrant. *Amendmentof Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g. Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual-Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

Our review of your renewal application, your opposition to the NAACP/NBMC petition, and your response to our inquiry shows no evidence of discrimination but does reveal a record of inadequate EEO efforts. Review of your renewal application, opposition and inquiry response indicates that from December 1, 1985, through December 1, 1988, you had 33 full-time hiring opportunities, 26 of which were upper-level.[1] On your renewal application, you list six general recruitment sources that you contacted during the reporting year, *i.e.*, the 12-month period prior to filing of the application. These sources including Peace College, the Durham Human Relations Commission, and the Employment Security Commission, produced no minority referrals. In addition, you list two female sources, Meredith College and the Women's Center of Raleigh, and three minority sources, the Durham Committee on Black Affairs, Shaw University and North Carolina Central University, none of which produced minority referrals. You did, however, receive one minority referral from an employee. For three of the 33 vacancies, you sent letters notifying 34 recruitment sources[2] of specific job openings.[3] For ten vacancies, you listed various referral sources for applicants including the newspaper and a placement service. You listed employee and/or industry referrals as the only sources contacted for 12 other vacancies. For the remaining eight vacancies, the only sources of applicants listed were walk-in and former employee rehired. Five of the 97 applicants for full-time positions were minorities, four of whom were Black and one of whom was Asian, and minorities were in the applicant pools for five of the 33 overall vacancies and three of the 26 upper-level positions. Two minorities, one Black and one Asian, were hired for upper-level positions.[4]

In your renewal application, you state that, even though you comply with the Commission's processing guidelines, you are currently updating and revising your mailing list to increase the likelihood of referrals from local organizations and national institutions with high female and minority memberships and enrollment. In your inquiry response, you state that it is difficult to recruit minorities because of the low unemployment rate in your area and describe plans for changing your hiring procedures to broaden your recruitment base. These plans include formalizing notification of minority groups and organizations of job openings, increasing the number of recruitment sources contacted, maintaining written documentation of recruitment efforts, and conducting periodic self-evaluation.[5]

In view of the foregoing, it is apparent that the station's EEO efforts during the license term were deficient. First you did not keep a complete record of your recruitment contacts. Second, you did not engage in adequate self-assessment of your overall EEO efforts. Even though you received few minority referrals from the sources that you contacted, you did not alter your EEO program until the last year of the license term.[6] Your statement that it is difficult to recruit minorities in your area because of low

unemployment is without merit because such a situation would affect the recruitment of minorities and non-minorities equally.

We conclude that the station's EEO record does not raise substantial and material questions of fact sufficient to warrant a hearing. In addition, we find no evidence of discrimination by the licensee. However, we do find WZZU's record to be similar to the EEO record of Stations WSPA/WSPA-FM in *In Re Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) in which we imposed reporting conditions and a Notice of Apparent Liability of Forfeiture for $5,000. Like the licensee of WSPA, you kept records of recruitment contacts insufficient to adequately self-assess your EEO program and failed to alter your EEO program until the last year of the license term despite receiving few minority referrals from the sources that you contacted.

In summary, while the WZZU's record does not warrant designation for a hearing, the station's EEO efforts during the license term were deficient. Therefore, we will grant renewal of WZZU's license subject to reporting conditions and a Notice of Apparent Liability of forfeiture for $5,000.

Accordingly, IT IS ORDERED, that the application of Villcom Broadcasting Inc. for renewal of the license of Station WZZU(FM) IS GRANTED subject to reporting conditions and A Notice of Apparent Liability of forfeiture for $5,000.

IT IS FURTHER ORDERED that the licensee of Station WZZU(FM) submit an original and one copy of the following information on August 1, 1992, August 1, 1993, and August 1, 1994:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral sources for each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[7]

(b) A list of employees as of the July 1, 1992 payroll period for the first report and as of the July 1, 1993, and July 1, 1994, payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the stations' efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

The reports are to be filed with the Secretary of the Commission to the attention of the Mass Media's EEO Branch.

Should you have any questions regarding this action or require further information concerning the employment reports, you may call the Mass Media Bureau's EEO Branch (202-632-7069). With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this letter. Any comments concerning your ability to pay should include those financial items set forth in the attachment to this letter. This letter was adopted by the Commission on October 25, 1991.

BY DIRECTION OF THE COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] Although WZZU is licensed to Burlington, North Carolina, its studios are located in Raleigh, North Carolina. Pursuant to *Michigan and Ohio Renewals*, 3 FCC Rcd 6944 (1988), we will evaluate WZZU based on the location with the larger minority population which, in this case, is Raleigh, North Carolina. The Raleigh-Durham, North Carolina Metropolitan Statistical Area has an available labor force that is 24.2% minority (22.8% Black, .7% Hispanic, .6% Asian, .1% American Indian). In 1988, the licensee employed three minorities (two Blacks and one Asian on its overall staff of 24 (12.5%) and two minorities (one Black and Asian) on its upper-level staff of 21 (9.5%). In 1987, the licensee employed no minorities on its overall staff of 29 and its upper-level staff of 24. In 1986, it employed one Black on its overall staff of 28 (3.6%) and its upper-level staff of 23 (4.3%). In 1985, one Hispanic was employed on a overall full-time staff of 29 (3.4%) and on an upper-level staff of 26 (3.8%). In 1984, no minorities worked on the station's overall staff of 18 and upper-level staff of 15. The assignment of WZZU's license to the present licensee became effective on August 11, 1983.

[2] We note that this list of recruitment sources included the sources on your renewal application.

[3] Your inquiry response included seven letters that you sent out informing the recruitment sources of specific job openings. You also stated that you contacted these sources for an additional vacancy although you did not supply a copy of the letter. However, one of the letters was for a part-time position and three of the letters, although dated before the end of the period under review, appear to be for positions that you did not fill until after December 1, 1988, the end of the license term. We assume that you contacted the 34 recruitment sources for just these openings, although you express uncertainty as to how often they were contacted. You state in your inquiry response that you did not "possess comprehensive data regarding applicant flow for all positions filled during the past three years," and that you contacted these sources "on at least seven occasions."

[4] Although the station was not challenged regarding its recruitment of women, it is our practice in all cases to review each station's EEO efforts toward both women and minorities. The Raleigh-Durham, North Carolina Metropolitan Statistical Area has an available labor force that is 46.0% female. Reviewing the station's employment and recruitment of women, we find the licensee's EEO program to be acceptable. However, we note a recent decline of women in the top four categories and encourage the licensee to closely monitor its program regarding women.

[5] You also state in your inquiry response that you have established a training program under which a minority works part-time at the station with an engineer. Although the trainee is employed by an independent contractor at the present time, you plan to hire him for a full-time position when he finishes his training.

[6] Although the list of 34 recruitment sources that you contacted is impressive, the evidence suggests that you did not begin contacting this large number of sources until June, 1988.

[7] Such a list might start:

1. News Director: Official and Mangers; Full-time

3 applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Conatcted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-317

In the Matter of

Amendment of Section 73.202(b), RM-7854
Table of Allotments,
FM Broadcast Stations.
(Marshall, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1991; Released: November 7, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Paradis Broadcasting of Marshall, Inc. ("petitioner"), requesting the substitution of Channel 298C3 for Channel 296A at Marshall, Minnesota. Petitioner also requests modification of its license for Station KBJJ(FM), Channel 296A, to specify operation on Channel 298C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Marshall, Minnesota, with an additional wide coverage area FM station. Channel 298C3 can be allotted to Marshall, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 7.2 kilometers (4.5 miles) southwest of the community.[1] We shall also propose to modify petitioner's license for Station KBJJ(FM) to specify operation on Channel 298C3 in lieu of Channel 296A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Marshall or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Marshall, Minnesota	259C1, 296A	259C1, 298C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 298C3 at Marshall are 44-24-37 and 95-51-43.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-318

In the Matter of

Amendment of Section 73.202(b), RM-7853
Table of Allotments,
FM Broadcast Stations.
(Three Lakes, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1991; Released: November 7, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. Three Lakes Broadcasting ("petitioner") has requested the allotment of Channel 229C2 to Three Lakes, Wisconsin, as that community's first local broadcast service. Petitioner provided an engineering study in support of the request and indicated its intention to file an application for the channel, if allotted.

2. Although Three Lakes is not incorporated, the 1980 U.S. Census has a listing for the town of Three Lakes with a population of 1,864. The *1991 Rand McNally Commercial Atlas* has a listing for Three Lakes, crediting the town with a population of 820. We request petitioner to clarify in comments the population of Three Lakes.

3. We believe that petitioner's proposal to provide Three Lakes with its first local broadcast service warrants further consideration. Therefore, we shall invite comments on the proposal to allot Channel 229C2 to Three Lakes, Wisconsin. A staff engineering analysis indicates that Channel 229C2 can be allotted to Three Lakes consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules without a site restriction.[1] Channel 229C2 is short spaced to Channel 232A, Eagle River, Wisconsin. However, Channel 233C2 has been substituted for Channel 232A in MM Docket 88-313.[2] The grant of a license for Channel 229C2 at Three Lakes may be withheld pending issuance of the license for Station WRJO, Eagle River, on Channel 233C2. Canadian concurrence will be requested for this allotment since Three Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission Rules, with respect to Three Lakes, Wisconsin, as reflected below:

	Channel No.	
City	Present	Proposed
Three Lakes, Wisconsin	---	229C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Susan Rester Miles
Hessian, McKasy & Soderberg
Professional Association
4700 IDS Center
Minneapolis, Minnesota 55402

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The coordinates for Channel 229C2 at Three Lakes are 45-47-48 and 89-10-06.

[2] *See* 4 FCC Rcd 3793 (1989). A construction permit for Channel 233C2 at Eagle River was granted on July 12, 1990 (BPH-900501IA).

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-319

In the Matter of

Amendment of Section 73.202(b), RM-7844
Table of Allotments,
FM Broadcast Stations.
(Blakely, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1991; Released: November 7, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Hirsch Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 226C3 for Channel 226A at Blakely, Georgia, and the modification of Station WDKZ(FM)'s license to specify the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by the substitution of Channel 226C3 for Channel 226A at Blakely, Georgia, since it could provide the community with an expanded coverage area FM service. Channel 226C3 can be allotted to Blakely at petitioner's specified site in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.6 kilometers (10.3 miles) southwest of the community.[1] We shall also propose to modify the license for Station WDKZ(FM) to specify operation on Channel 226C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Blakely, Georgia	226A	226C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy F. Perkins, Jr.
1724 Whitewood Lane
Herndon, Virginia 22070
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 226C3 at Blakely are North Latitude 31-17-00 and West Longitude 85-04-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-320

In the Matter of

Amendment of Section 73.202(b), RM-7832
Table of Allotments,
FM Broadcast Stations.
(Brunswick, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1991; Released: November 7, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert L. Yontz ("petitioner") requesting the allotment of Channel 281A to Brunswick, Georgia, as the community's third local FM service.[1] Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 281A to Brunswick, Georgia, since it could provide the community with its third local FM service. Channel 281A can be allotted to Brunswick in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Brunswick, Georgia	264C1, 268C	264C1, 268C 281A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Griffith Johnson, Jr.
Bryan, Cave, McPheeters & McRoberts
700 13th Street, N.W., Suite 700
Washington, D.C. 20005-3960
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] A *Notice of Proposed Rule Making* in MM Docket No. 90-326 proposes the reallotment of Channel 273C1 from Waycross, Georgia to Brunswick, Georgia. *See* 5 FCC Rcd 4014 (1990). Therefore, this allotment could constitute a fourth local FM service.

[2] The coordinates for Channel 281A at Brunswick are North Latitude 31-10-00 and West Longitude 81-29-48.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-321

In the Matter of

Amendment of Section 73.202(b), RM-7833
Table of Allotments,
FM Broadcast Stations.
(Port St. Joe, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 28, 1991; Released: November 7, 1991

Comment Date: December 30, 1991
Reply Comment Date: January 14, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WMTO Limited Partnership, permittee of Station WMTO(FM), Channel 228C3, Port St. Joe, Florida, requesting the substitution of Channel 228C2 for Channel 228C3 at Port St. Joe, and the modification of Station WMTO(FM)'s construction permit to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 228C2 for Channel 228C3 at Port St. Joe, since it could enable Station WMTO(FM) to expand its coverage area. Channel 228C2 can be allotted to Port St. Joe, Florida, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 7.7 miles (4.8 miles) southeast of the community.[1] Channel 228C2 at Port St. Joe would be short-spaced to Channel 228A, Station WRJM, Geneva, Alabama. However, Station WRJM was modified, effective February 20, 1990, to specify operation on Channel 229C1. *See Report and Order* (MM Docket No. 87-618), 5 FCC Rcd 37 (1990). Therefore, the grant of a license for Channel 228C2, Port St. Joe, may be withheld until Station WRJM(FM) is licensed on Channel 229C1 at Geneva, Alabama. We shall also propose to modify petitioner's construction permit for Station WMTO(FM) to specify operation on Channel 228C2 in lieu of Channel 228C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Port St. Joe or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Port St. Joe, Florida	228C3, 233C	228C2, 233C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 30, 1991,** and reply comments on or before **January 14, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Erwin G. Krasnow
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W., Suite 700
Washington, D.C. 20005-2301
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The coordinates for Channel 228C2 at Port St. Joe are North Latitude 29-45-17 and West Longitude 85-15-26.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

SOUTH CENTRAL BELL File Nos. 21181-CD-P-1-83
26390-CD-P-2-83
26283-CD-P-1-83

Licenses for paging stations at
various locations in Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 7, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Louisiana Association of Radio Common Carriers (LARCC or Petitioner) has petitioned the Common Carrier Bureau (Bureau) to reconsider *South Central Bell*, 3 FCC Rcd 1044 (Mob. Ser. Div. 1988) (*Order*). LARCC contends that the Mobile Services Division (MSD) failed to address Petitioner's allegations that South Central Bell (SCB) made misrepresentations to the Commission, and that SCB effected an unauthorized transfer of control of the subject facilities. In addition, Petitioner submits that the MSD erred by granting an extension of time for SCB to commence operation of the facilities. SCB opposes LARCC's petition. For the reasons discussed below, we deny LARCC's petition.

II. BACKGROUND

2. The subject applications seeking authorization for SCB to provide paging service in New Orleans, Covington, Houma City, and Slidell, Louisiana, were granted on April 24, 1985. SCB was required to complete construction of its facilities and commence operation within 12 months, *viz.*, by April 24, 1986. SCB did not meet this deadline.

3. Although SCB filed FCC Forms 489[1] on April 21, 1986, notifying the Commission that it had constructed the facilities in accordance with Section 22.43 of the rules, SCB was unable to provide service to these four markets because the Louisiana Public Service Commission (LPSC) suspended SCB's tariffs pending resolution of a complaint filed by LARCC. In response to LARCC's informal opposition to SCB's authorizations and request for an investigation of SCB, the MSD found that an extension of time to SCB to commence service was justified, that no unauthorized transfer of control had taken place as alleged, and that waiver of Sections 22.13(f) and 22.43(a) were appropriate.

III. DISCUSSION

4. LARCC argues that the MSD failed to address its allegations regarding SCB's concealment of the LPSC's suspension of the proposed tariff and SCB's misrepresentation that its stations were operational when it filed its initial Forms 489. LARCC submits that the MSD erred in granting SCB a waiver of the Commission's rules and policy concerning authorization holders' reporting obligations.

5. In the proceeding below, SCB explained that its failure to disclose the LPSC's action was due to a belief that the Commission's state certification provisions do not apply to tariff proceedings. *See Order* at paras. 3-4. SCB further explained that it filed the Forms 489 as a representation that service to the public would begin shortly, and that SCB had a reasonable belief that its tariff would be approved without substantial delay. *Id.* at para. 5 and n. 3. Although SCB should have reported the tariff problem and resulting delay in commencement of service, we conclude that any failure to disclose was due to misunderstanding rather than deception or intentional misrepresentation. The MSD granted SCB a waiver of Sections 22.13(f) and 22.43(a) because it found that SCB's failure to commence service was "due to matters outside of SCB's control." *Id.* at para. 8. Petitioner offers no new evidence sufficient to show that the MSD erred in reaching this conclusion. Accordingly, we cannot find that SCB engaged in deception before the Commission.

6. The next error alleged by LARCC is that the MSD failed to find that SCB's authorizations automatically expired. Petitioner notes that Sections 22.13(f) and 22.43(a)(3) of the Commission's rules require that a holder of a newly authorized mobile radio station secure all requisite state authority and commence service within one year of grant. Petitioner points out that SCB failed to meet the 12 month deadline and waited until June 29, 1987 to request an extension of time to begin operation of its facilities. Consequently, argues Petitioner, SCB's authorizations expired automatically on April 24, 1986, and the MSD erred in unconditionally granting SCB an extension of time, a year later, until December 19, 1987 to commence service. LARCC further alleges that the MSD's action was contrary to both the rules and precedent. It argues that because SCB did not file its proposed tariff until April 1, 1986, almost one year after grant, the MSD could not have found that SCB diligently pursued its obligation to secure state authority as required by Section 22.43 of the rules. Moreover, says Petitioner, the MSD granted an extension of time until December 19, 1987, which far exceeded the eight month limit specified by Section 22.43(b)(2) of the rules. The MSD's action, claims Petitioner, was also at variance with decisions involving similar factual situations. For instance, it continues, in *T-Com, Inc.*, 3 FCC Rcd 1772 (1988), the Bureau held that the failure to commence operation within the time allotted constituted a violation of Section 22.43, for which it levied a $5,000.00 forfeiture. LARCC avers that the MSD erred by not finding that SCB was liable for a monetary forfeiture, if not revocation.

7. Because SCB's facilities were not ready for operation within 12 months after the grant of the radio station authorizations LARCC's assertion that SCB's authorizations expired pursuant to the terms of Section 22.43(a)(3) is correct. However, in light of the circumstances of this case, we, nevertheless, find good cause to reinstate the authorizations, *nunc pro tunc*, on our own motion. *See*

T-Com, Inc., 5 FCC Rcd 6691 (1990). We note that SCB's facilities were constructed and fully operational at the time the *Order* was released. Therefore, revocation does not represent a reasonable remedy for the Section 22.43 violation. Absent a strong justification, the public interest would not be served were the citizens of New Orleans, Covington, Houma City and Slidell, Louisiana deprived of the nascent communications service provided by SCB. Moreover, the stations were constructed in a timely manner and, despite LARCC's charges to the contrary, SCB diligently sought state approval. SCB has correctly noted that the presumption of due diligence standard specified in Section 22.43 is not relevant because it pertains to state certification, not subsequent tariff approval. *See Order* at para. 3. Unlike state certification, which is usually sought as soon as a carrier decides to enter a market or applies for Commission authorization, proposed tariffs are not normally filed until the carrier's facilities are constructed and it is authorized to offer service. SCB sought tariff approval contemporaneously with its completion of construction of its facilities. Because this was the appropriate time for seeking tariff approval, we find that the MSD was correct in its conclusion that SCB exercised due diligence.

8. We now turn to the matter regarding monetary forfeiture. Although SCB notified the Commission that the facilities were constructed when it filed its first FCC Forms 489 on April 21, 1986, it was not until SCB amended these forms on March 19, 1987 that it advised the Commission of the LPSC's decision to suspend SCB's tariff, and SCB did not request an extension of time to commence service until June 29, 1987. SCB's request was therefore untimely. The MSD acknowledged that "SCB should have asked for an extension of time to commence service to the public at the time it filed its first Forms 489",[2] but no forfeiture was imposed. We are prevented from issuing a notice of apparent liability now. This is because Section 503 of the Communications Act precludes the imposition of any monetary penalty against a licensee "if the violation charged occurred more than one year prior to the date of issuance of the required notice of . . . apparent liability . . . ".[3] SCB's offense commenced on April 21, 1986, when SCB notified the Commission that it had constructed its facilities, but failed to request an extension of time to secure state authority to provide service, and it continued until June 29, 1987, when SCB requested an extension of time to commence service. Consequently, over four years have passed since the apparent violation occurred.

9. Finally, LARCC alleges that the MSD erred by not finding that SCB illegally transferred control of its facilities to A+ Beepers. The Petitioner's contention is not supported by any facts not considered by the MSD and discussed in the *Order*. *See Order* at paras. 9-11. Indeed, Petitioner incorporates by reference the allegations and facts it raised in the MSD proceeding. We have reviewed the record below as well as LARCC's reiterations and fail to find error in the MSD's analysis or conclusion.

IV. CONCLUSION

10. We have reviewed carefully the issues raised by Petitioner in its petition for reconsideration of the MSD's *Order*. We find no reversible error.

V. ORDERING PARAGRAPH

11. Accordingly, IT IS ORDERED THAT South Central Bell's construction authorizations to provide paging service in New Orleans, Covington, Houma City, and Slidell, Louisiana ARE REINSTATED, effective April 24, 1986.

12. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by the Louisiana Association of Radio Common Carriers IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] "Notification of Status of Facilities Under Part 22 of FCC Rules."

[2] *Order* at p.1045.

[3] 47 U.S.C. § 503(b)(6)(A)(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, California — File No. BPET-811118KF

Order to Show Cause Why the Permit of KEEF-TV should not be revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., Permittee of KEEF-TV, Los Angeles, California — File NO. BLET-870225KE

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. Permittee of KEEF-TV, Los Angeles, California — File No. BMPCT-870610KU

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., Permittee of KEEF-TV, Los Angeles, California — File No. BLET-870610KT

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC., Permittee of KEEF-TV, Los Angeles, California

For Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1991; Released: November 8, 1991

By the Commission:

BACKGROUND

1. This proceeding involves an Order to Show Cause, Hearing Designation Order and Notice of Apparent Liability against Black Television Workshop of Los Angeles, Inc. (BTW), 3 FCC Rcd 5443 (1988). Specifically, the Commission seeks to determine: (1) whether there was an unauthorized transfer of control of BTW; (2) whether BTW made misrepresentations to, was lacking in candor in its dealings with, or attempted to mislead or deceive the Commission as to the true ownership and control of the permittee in BTW's original permit application, subsequent applications, in ownership reports, and in pleadings filed with the Commission with respect to the past and current control of BTW; and (3) whether BTW violated 47 C.F.R. § 73.3613(b), requiring the filing of contracts concerning ownership or control, by failing to file its articles of incorporation, bylaws, and any agreements or understandings affecting ownership and control of BTW.

2. The hearing was scheduled to begin on March 27, 1989 in Los Angeles, California. On March 22, 1989, Booker T. Wade, an officer and director of BTW, filed a petition to disqualify the presiding administrative law judge, Joseph Chachkin. The ALJ dismissed the petition, FCC 89M-1011 (Mar. 29, 1989), and, on April 5, 1989, BTW filed an "Exception to Ruling Not To Disqualify Presiding Judge," through its attorney. Pursuant to 47 C.F.R. § 1.245(b)(4), the ALJ certified the question to the Commission,[1] and suspended the hearing pending a ruling by the Commission. FCC 89M-1202 (Apr. 18, 1989).[2]

3. Also on March 22, 1989, BTW and Hispanic Christian Communications Network (HCCN) filed an application seeking consent to the assignment of the permit of KEEF-TV, Los Angeles, California, from BTW to HCCN. In a simultaneously filed Emergency Petition for Special Relief, BTW and HCCN requested a grant of that application pursuant to the Commission's minority distress sale policy, *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). The history of that matter is set out in our Order released January 22, 1991, directing the Mass Media Bureau to consider the BTW/HCCN assignment application under the Commission's distress sale policy, provided two impediments to the grant are removed (Distress Sale Order). 6 FCC Rcd 381 (1991), recon. denied 6 FCC Rcd _____ (1991).

4. However, still pending before the Commission are a Petition for Extraordinary Relief filed June 29, 1989 by BTW and HCCN and related pleadings.[3] To the extent that the relief requested in the petition is the same as that which we directed the Bureau to consider in January, that is, that the application for consent to assignment of the permit of KEEF-TV to HCCN be granted, it will be dismissed as moot.

PETITION FOR EXTRAORDINARY RELIEF

5. Generally, a broadcast permittee whose construction permit has been designated for a hearing on issues relating to the permittee's basic character qualifications is not permitted to assign its permit until the issues are resolved in its favor. *See Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). Nonetheless, the Commission has historically recognized three general exceptions to the *Jefferson Radio* policy: (1) physical impairment, illness, or disability of the licensee or permittee; (2) bankruptcy of the licensee or permittee; and (3) the Commission's minority distress sale policy.

6. Our Distress Sale Order was based on our minority distress sale policy; the request before us now is not. Rather, BTW and HCCN argue that there is a broader public interest basis for allowing the sale of a permit or license otherwise subject to *Jefferson Radio* policy. But, without dwelling on the parties' assertion, it is clear that the relief sought here is within the scope of our Distress Sale Order, which establishes the conditions under which we will permit the assignment to go forward. Accordingly, the Petition for Extraordinary Relief is dismissed as moot.[4]

7. Our Distress Sale Order only directed the Bureau to consider the assignment application. Moreover, it is not certain at this time that the assignment application will be granted or consummated. Therefore, it will assist the orderly and efficient disposition of the Commission's business to address the Petition to Disqualify and related matters that are still before us.

MOTION TO DELETE AND MODIFY ISSUES

8. BTW's motion to delete and modify issues claims that (1) the issue relating to unauthorized transfer of control must be deleted because the Commission has admitted that it has no policy to determine when an unauthorized transfer of control occurs for a non-profit educational permittee or licensee, and, (2) the Bureau has not demonstrated the existence of a prima facie case based on the facts elicited on exchange of direct case exhibits.

9. The Bureau opposes the motions because they basically reargue an earlier petition for reconsideration of the HDO which the Commission denied. *See Black Television Workshop of Los Angeles, Inc.*, 4 FCC Rcd 3871 (1989). We agree.

10. Nonetheless, we will address BTW's claim that the Commission has no policy for determining when an unauthorized transfer of control occurs. The argument is based on the following statement: "Although we have established a general framework for addressing these matters in connection with 'traditional' stock corporations, we presently lack a comparably articulated Commission policy for determining when a transfer of control of a non-stock entity has occurred." *Notice of Inquiry in re Transfers of Control of Certain Licensed Non-Stock Entities*, 4 FCC Rcd 3403, ¶ 1 (1989) (NOI).

11. We reject BTW's argument insofar as it suggests that, because no general guidelines have been adopted to provide greater certainty in assessing control questions, the Commission is impotent in dealing with any issue concerning an unauthorized transfer of control of a non-profit educational permittee or licensee. Obviously, such is not, nor should it be, the case. *See Pacifica Foundation*, 36 FCC 147 (1964).

12. Moreover, this argument is founded on an unduly restrictive characterization of the issues specified for hearing in this proceeding. The issues designated against BTW are not simply to determine whether the transition of directors was gradual or abrupt, but whether control of BTW "was transferred without Commission approval, *or exercised by persons not authorized to do so*, in violation of Section 310(d) of the Communications Act" (emphasis added). *See Black Television Workshop of Los Angeles, Inc.*, 3 FCC Rcd 5443 ¶ 3 (1988). Furthermore, BTW has ignored the collateral issues as to whether BTW made misrepresentations or was lacking in candor in its dealings with the Commission.

PETITION TO DISQUALIFY ALJ

13. In its petition to disqualify the ALJ, BTW charges that the ALJ made several interlocutory rulings which will cause BTW irreparable prejudice, will result in an unfair hearing, and will cause a remand of this proceeding. BTW argues that these rulings, when considered together, demonstrate the ALJ's personal bias against BTW. We disagree and affirm the ALJ's denial of BTW's petition to disqualify the presiding judge.

14. To establish a basis for the ALJ's disqualification, BTW must show personal bias or prejudice that will impair his ability to act in an impartial manner. *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501 ¶¶ 4-5 (1977), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921). A heavy burden of proof is placed on a party seeking to establish bias. *Barnes Enterprises, Inc.*, 66 FCC 2d at 502-03 ¶¶ 6-8. In *Berger*, the Court said that an affidavit alleging bias "must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." 255 U.S. at 33-34. Moreover, BTW should not be permitted as a "discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable." *Id.* at 31. Ordinarily, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudical source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

15. The Commission has recognized, however, that because "it is not always possible to establish an extrajudicial source for bias, . . . the comments and rulings of the trier of fact may be relevant to the existence of prejudice." *KAYE Broadcasters, Inc.*, 35 FCC 2d 548, 548 ¶ 3 (1972). Thus, we have reviewed the ALJ's rulings and comments consistently with the holding in *KAYE* and conclude that they do not demonstrate bias.

16. The central theme of BTW's claim of prejudice rests on the Bureau's intention to call Booker T. Wade as its first witness and not to submit written direct case testimony. Specifically, BTW argues that the ALJ, by allowing

the Bureau to schedule Wade as the first witness, has improperly shifted the burden of proceeding with the evidence and the burden of proof to BTW. Moreover, the ALJ's denial of BTW's motion to dismiss several of the parties for failure to file appearances, his failure to compel production of documents, his failure to compel the Bureau to provide definitive answers to interrogatories and his failure to require the Bureau to submit any written direct case testimony will force BTW to respond to unknown allegations by the various parties as witnesses.

17. The ALJ, however, has made clear that the burden of proceeding and the burden of proof remain with the Bureau, as provided in the designation order. FCC 89-1202 (Apr. 18, 1989). The voluminous pre-designation pleadings, the Bill of Particulars, and the Bureau's description of its witnesses' testimony provide adequate knowledge to Wade as to the factual allegations against BTW. Since none of the other parties has the burden of proceeding, no party other than the Bureau is obligated to present a direct case. Wade's sole obligation as a witness is to testify truthfully. We see no showing of bias in these facts. The ALJ's rulings were made in a fair and even-handed manner.

18. In addition, BTW cites the ALJ's ruling allowing one of the Bureau's witnesses to testify in Washington, D.C., as a further example of bias. However, we do not believe that this provides a basis for a charge of prejudice. It is a common practice to accommodate witnesses when possible. In any event, the Bureau withdrew its request. There is no evidence of bias in this sequence of events.

19. BTW also submits that the ALJ's failure to require the Bureau to compensate Wade for his travel expenses in connection with his appearance in Washington, D.C., for a deposition was a violation of 47 C.F.R. § 1.339, and that the ALJ should not have allowed the Bureau to renege on its promise to do so. BTW charges that this ruling was just another act of favoritism by the ALJ. We see no need to discuss the series of events precipitating the ALJ's ruling other than to say that, having reviewed the circumstances and finding the ALJ's action reasonable, the mere allegation of an adverse ruling during the course of a proceeding provides no evidence of bias.

20. Finally, BTW cites examples from the pre-hearing transcript, obviously in an attempt to show utterances by the ALJ that demonstrate his bias against BTW. However, the two examples chosen are totally without merit. BTW claims that, by characterizing BTW's bylaws as "mysterious," the ALJ was, by definition, expressing his opinion that the bylaws were "illegitimate." The issues in this case include the question of the existence and substance of BTW's bylaws. The Commission records for KEEF-TV do not contain a copy of the by-laws and the only copy in the record includes no certification as to its authenticity. Thus, the ALJ's use of the term "mysterious" relating to the bylaws is no more evidence of a foregone conclusion on his part than if he had referred to the "alleged" bylaws. BTW also claims that the ALJ's query as to why BTW would want to invoke the attorney-client privilege was proof of the ALJ's mental conclusion that BTW had something to hide. This too is pure speculation. Neither of these utterances demonstrate any judicial impropriety or bias on the part of the ALJ and BTW has offered no evidence to the contrary.

21. In summary, BTW appears to have proceeded on the theory that by presenting an exhaustive list of alleged acts of bias, a pattern of bias might be established. However, BTW has merely listed several of the ALJ's rulings with which it disagrees. Each one, in turn, can be reviewed by an appropriate tribunal. Therefore, we affirm the ALJ's denial of BTW's petition to disqualify the presiding judge; BTW has failed to demonstrate any evidence warranting a departure from our general policy that such rulings standing alone do not establish a basis for disqualification. *Barnes Enterprises, Inc.*, 66 FCC 2d at 501.

22. In the event that the assignment contemplated herein is not granted or consummated, the ALJ will be able to rule promptly and fairly on any questions relating to the issues designated against BTW.

23. ACCORDINGLY, IT IS ORDERED, That the Exception To Ruling Not To Disqualify Presiding Judge filed April 5, 1989 by Black Television Workshop of Los Angeles, Inc., IS DENIED; and that the Memorandum Opinion and Order of Administrative Law Judge Joseph Chachkin, FCC 89M-1011, March 29, 1989, IS AFFIRMED.

24. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed June 29, 1989 by Black Television Workshop of Los Angeles, Inc. and Hispanic Christian Communications Network IS DISMISSED as moot.

25. IT IS FURTHER ORDERED, That the Mass Media Bureau's Motion to Dismiss Petition for Extraordinary Relief filed on July 11, 1989; the Mass Media Bureau's Motion to Dismiss Supplement to Petition for Extraordinary Relief filed on November 22, 1989; the Motion to Strike filed December 6, 1989 by Black Television Workshop of Los Angeles, Inc.; and a Motion to Expedite the Commission's Review filed June 15, 1990 by Hispanic Christian Communications Network; ARE DISMISSED as moot.

26. IT IS FURTHER ORDERED, That the Motion for Leave to File and the Motion to Delete and to Modify Issues filed December 11, 1989 by Black Television Workshop of Los Angeles, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before us, in addition to the pleadings mentioned above, are Comments filed April 14, 1989 by the Mass Media Bureau and an Opposition to the Bureau's Comments filed April 28, 1989 by BTW. At the time of the ALJ's certification, 47 C.F.R. § 1.245(b)(4) provided that exceptions to an ALJ's ruling of non-disqualification be certified to the Commission. On August 30, 1990, the Commission amended Section 1.245 to provide that such exceptions be certified to the Review Board. 5 FCC Rcd 5366. We will rule on the matter before us because it was filed prior to the rule change.

[2] In his certification order, the ALJ noted that the original petition seeking disqualification of the presiding judge had been filed by Wade instead of counsel for BTW, and that it was untimely because it was filed after the start of the hearing which began with the March 17, 1989 admission session. However, in light of our action herein, we need not consider the substance of these procedural questions.

[3] The following responsive pleadings were filed in this proceeding: (1) a Motion to Dismiss filed on July 11, 1989 by the Mass Media Bureau; (2) a Supplement to Petition for Extraordinary Relief filed November 14, 1989 by BTW and HCCN; (3) a Motion to Dismiss Supplement to Petition for Extraordinary Relief filed November 22, 1989 by the Mass Media Bureau; (4) a Petition for Leave to File and an Opposition to Mass Media Bureau's Motion to Dismiss Petition for Extraordinary Relief filed November 30, 1989 by HCCN; (5) a Motion to Strike filed December 6, 1989 by BTW; (6) an Opposition to Mass Media Bureau's Motion to Dismiss Supplement to Petition for Extraordinary Relief filed December 6, 1989 by HCCN; (7) a Motion for Leave to File and a Motion to Delete and to Modify Issues filed December 11, 1989 by BTW; (8) an Opposition to Motion to Strike filed December 18, 1989 by Mass Media Bureau; (9) an Opposition to Motion for Leave to File and Motion to Delete and to Modify Issues filed December 27, 1989 by Mass Media Bureau; (10) a Reply to MMB Opposition filed January 9, 1990 by BTW; (11) a Supplement to Petition for Extraordinary Relief filed January 24, 1990 by BTW and HCCN; and (12) a Motion to Expedite the Commission's Review filed on June 15, 1990 by Hispanic Christian Communications Network. Also a letter dated July 10, 1989 was received requesting an extension of time to file an opposition to the Petition for Extraordinary Relief was filed by Mary V. Woodfork. The letter was addressed to the presiding ALJ, but a check of the Commission's files indicates that no further pleading of that nature was filed.

[4] In light of this action, the Bureau's motion to dismiss is also moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ATLANTIC TELE-NETWORK, INC. File No. I-T-C-90-153

Application for authority
to acquire and operate
facilities for direct service
between the U.S. and Guyana

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 31, 1991; Released: November 8, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-captioned application, filed on July 5, 1990, by Atlantic Tele-Network, Inc. (ATN) and supplemented by letters dated October 19, 1990, February 12, 1991, and August 14, 1991, requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for voice, record and data communications services (switched and private line[1]) between the United States and the Co-operative Republic of Guyana (Guyana). In this decision, we grant only ATN's request to lease and operate facilities for the provision of switched services between the United States and Guyana, subject to the conditions set forth below.

II. THE APPLICATION

2. ATN is a corporation organized under the laws of the state of Delaware. ATN states that it will furnish voice, record and/or data communications between the United States and Guyana upon grant of the application. ATN does not now furnish any such services nor does it have authorization under Section 214 to provide services to Guyana. It states that international communications services to Guyana are being provided solely by American Telephone and Telegraph Co. (AT&T) and, thus, grant of its application would permit new entry and would increase competition in the international telecommunications marketplace. ATN adds that it intends to adhere to the same conditions which the Commission imposed upon ATN's subsidiaries, Atlantic Tele-Network Co. (ATN Co.) and Puerto Rico Telecom Corp. (PR Telecom), in their authorizations to furnish international services.[2] Hence, ATN states that it will (a) maintain separate books of account from its subsidiary Vitelco [3]; (b) not own any switching or transmission facilities jointly with Vitelco; (c) use Vitelco's services, if at all, only pursuant to Vitelco's published tariffs; and (d) comply with the cost allocation, customer proprietary network information, and network disclosure rules set forth in *Puerto Rico Telecommunications Services*, 2 FCC Rcd 6600 (1987). ATN asserts that it should be classified as non-dominant under the Commission's *Competitive Carrier* [4] and *International Competitive Carrier* [5] decisions. ATN's application was placed on public notice July 25, 1990. No comments were received during the pleading period.

3. On October 19, 1990, ATN filed a letter advising the Commission that ATN would acquire an eighty percent (80%) interest in the Guyana Telephone and Telegraph Company (GT&T). ATN adds that it intends to lease from US Sprint Communications Company Limited Partnership (US Sprint) and operate 90 voice-grade half circuits between US Sprint's Franklin, New Jersey earth station and the INTELSAT Atlantic Ocean Region (AOR) satellite located at 325.5^0 East Longitude, connecting with similar circuits between the satellite and an earth station in Guyana furnished by GT&T. ATN states that it will also lease from US Sprint and operate thirty bearer circuits in the Franklin, New Jersey earth station and a 2.048 Mbit circuit in US Sprint's fiber link between the Franklin, New Jersey earth station and US Sprint's point of presence at 60 Hudson St., New York, New York.[6]

III. SUBSEQUENT DEVELOPMENTS

4. *AT&T Letter.* On February 1, 1991, AT&T filed a letter stating that, while it does not oppose a grant of ATN's Section 214 application, it has recently acquired information that prompts AT&T to urge the Commission to classify ATN as a dominant carrier and to condition ATN's requested Section 214 authority in certain respects. AT&T states that it has been advised in its discussions with GT&T that once ATN has received Section 214 approval, GT&T would consider deviating substantially from the principles of proportionate return traffic by routing a disproportionate share of Guyana-to-U.S. calling to its parent in the United States – ATN. AT&T adds that the effect of such action is especially severe because the existing U.S-Guyana accounting rate is already one of the highest in the region and there is already a substantial traffic imbalance on this route in that seventy-five percent of the total U.S.-Guyana traffic originates in the United States.

5. AT&T asserts that ATN's acquisition of GT&T places it in a position analogous to that of U.S. carriers owned by foreign telecommunications entities who derive leverage on the U.S. market from their relationships to their non-competitive foreign operators. AT&T states that since the basic telecommunications services market in Guyana is not currently open to competition, the Commission's concerns regarding restricted market entry, unequal interconnection practices, discrimination, and return traffic patterns, are equally present in this case. AT&T thus suggests that the Commission should grant ATN's Section 214 request but classify ATN as a dominant carrier in order that information and data will be available to the Commission to allow it to address any adverse affects on U.S. policy objectives that may result from preferential arrangements between ATN and GT&T. AT&T states that Section 214 authority should include not only the previous conditions placed on ATN's international carrier subsidiaries, but also should require ATN, in its relationship with GT&T, to adhere to the principles of proportionate return traffic.

6. *ATN Letter.* On February 12, 1991, ATN filed a letter informing the Commission that, on January 28, 1991, ATN had closed on its purchase of an 80% interest in GT&T. Regarding AT&T's proposal for a condition gov-

erning return traffic from Guyana, ATN states that the Commission has never adopted a policy requiring proportionate allocation of return traffic. It argues that in the U.S.-Guyana market, proportionate allocation will prevent ATN from achieving any return traffic whatsoever and would have the effect of preserving this market as an AT&T monopoly.

7. Furthermore, ATN argues that its significant investment in GT&T over the next five years (approximately $16.5 million for the acquisition and $50 million in a capital improvement program over the next five years) provides ATN with an equitable claim to return traffic revenues. ATN believes that there is nothing disproportionate, in an equitable sense, about its return traffic proposal given the enormous investment and risk which ATN has undertaken in connection with the GT&T privatization. At a minimum, ATN submits that it should be permitted to implement its return traffic proposal for the five-year period during which it is subject to rigorous contractual obligations regarding the construction of a new Guyana telecommunications infrastructure. ATN states that after five years, it might be appropriate for the Commission to revisit whether the same or a different allocation of return traffic is necessary to promote the public interest.

8. *MCI Letters.* On June 28, 1991, MCI Telecommunications Inc. (MCI) filed a letter with the Commission also asserting that ATN's Section 214 application should be conditioned in certain respects.[7] MCI states that it has been negotiating for over a year with GT&T to open direct two-way switched telephone service between the United States and Guyana. MCI states that its efforts have, thus far, been unsuccessful. MCI expresses concern that inasmuch as ATN only mentions itself and AT&T as competing for services between the U.S. and Guyana, one could infer that ATN intends to limit competition between the U.S. and Guyana to only two U.S. service providers. MCI thus argues that ATN's Section 214 application should not be granted until ATN fully demonstrates and guarantees that all U.S. carriers, including ATN, will be able to compete on an equal basis for the provision of U.S.-Guyana telecommunications services. MCI is concerned that ATN, because it now controls 80 percent of GT&T, could effectively control IMTS traffic between the United States and Guyana. MCI states that once ATN receives Section 214 authority, it could distort the U.S. competitive market by denying U.S. carriers direct access to Guyana and denying U.S. carriers the ability to introduce lower collection rates to the U.S. public. Thus, MCI supports AT&T's argument that the Commission should classify ATN as dominant and provide adequate safeguards and guidelines to ensure that ATN and GT&T follow the Commission's International Settlements Policy (ISP). MCI concludes that this will provide the Commission with information to evaluate and address any adverse affects from the GT&T and ATN arrangements to the detriment of U.S. service providers and the U.S. public.

9. On August 8, 1991, MCI supplemented its June 28, 1991 letter and stated that a decision to grant ATN's Section 214 application would create a barrier to competition in the IMTS market and would be contrary to the public interest.[8] MCI asserts that prior to the aquisition of GT&T by ATN, MCI's negotiations to gain an operating agreement to open direct two-way switched telephone service between the United States and Guyana were progressing favorably. However, MCI states that during the subsequent acquisition of GT&T by ATN, MCI has received no further feed-back or further acknowledgement of any negotiations, nor received a formal agreement, to MCI's proposal on November 1, 1989.[9] MCI states that ATN, which was sent copies of MCI's correspondence with GT&T, has also failed to communicate with MCI.[10]

10. *Bureau request for additional information.* On August 7, 1991, the Common Carrier Bureau sent ATN a letter requesting that ATN clarify an issue regarding its application. The Bureau letter noted that at a July 22, 1991 meeting with Bureau staff, ATN stated that few, if any, of the circuits requested by ATN for switched services traffic would be for U.S.-originated traffic. In this context, the Bureau letter requested that ATN submit by August 14, 1991 data that provides a reasonable projection of ATN's U.S.-originated telephone traffic to Guyana.[11]

11. *ATN response to Bureau's request for additional information.* In its August 14, 1991 response, ATN stated that, based on available data and applying its best business judgment, ATN expects that it will be able to achieve a 30 to 35 percent share of U.S.-originated traffic to Guyana, within three to five years. Specifically, ATN believes that it can capture approximately 10 to 15 percent of the non-AT&T, U.S.-originated traffic to Guyana as a carrier's carrier. Through a marketing campaign targeted at end users in those areas with high concentrations of Guyanese residing in the United States, ATN expects that it will be able to capture an additional 20 percent of the U.S.-originated traffic. However, ATN suggests that, given the resources ATN is presently devoting to the improvement of basic telephone service in Guyana, ATN has not yet had an opportunity to develop its business plan for U.S.-originated traffic.

12. *ATN filing in CC Docket 90-337.* On August 16, 1991, ATN filed comments to the Commission's *Phase II Further Notice of Proposed Rule Making* in CC Docket 90-337.[12] ATN details its specific plan to carry return traffic from Guyana to the United States. ATN explains that when it purchased a controlling interest in GT&T, the Guyana network had no digital equipment, relied on outdated equipment with no spare parts, and had been loaded beyond full capacity with a call completion rate of 25%.[13] As part of it five-year capital improvements program, ATN has committed to installing a completely digital network with 70,000 to 100,000 connected access lines, a 60% call completion rate and 300 additional international circuits.

13. ATN explains that the Guyana-originated traffic revenues play a particularly important part in ATN's business plan for implementing the GT&T privatization and offering rates to U.S. customers for U.S.-originated traffic which are lower than AT&T's current rates. In particular, ATN states that it intends to carry the growth return traffic attributable to its $100 million capital improvements program in Guyana, while permitting AT&T to carry the existing level of return traffic. ATN proposes that this allocation plan apply during ATN's five-year modernization effort, during which GT&T will consider entering into operating agreements with other U.S. carriers.[14] ATN states that should such additional operating agreements be signed, AT&T's return traffic allocation would be divided proportionately among the U.S. carriers based on their share of U.S.-originated traffic. Finally, ATN suggests that, at the end of five years, the routing of Guyana-originated traffic could be revisited to determine

whether the same or a different allocation of this traffic should apply for the future. Once a competitive market exists at both ends of the U.S.-Guyana route, ATN believes that each U.S. carrier should obtain only such Guyana-originated traffic as it captures in the Guyana marketplace.

14. ATN reasserts its belief that the Commission has never adopted or enforced a rigid policy requiring U.S. carriers to accept only that amount of return traffic which corresponds to their portion of originating traffic. ATN notes that in CC Docket 86-494, *Regulatory Policies and International Communications*,[15] the Commission sought comment on three alternative policies for ensuring nondiscriminatory treatment of U.S. international carriers by foreign correspondents, including "proportional return allocation." ATN asserts that the Commission's failure to adopt any of the three alternatives in that docket is evidence that the Commission has never adopted nor enforced a rigid policy requiring proportionate return.

15. Moreover, ATN argues that the Commission has not taken steps to obtain information pertinent to return traffic allocation practices or to enforce a proportional allocation policy on a consistent basis. ATN states that the Commission does not require Section 214 applicants to provide any information regarding return traffic allocation, nor does the Commission customarily insert into Section 214 authorizations a condition directing carriers to accept only a proportional allocation of return traffic.[16]

16. ATN adds that the Commission's international traffic and revenue statistics reveal numerous and sometimes substantial disparities between the proportion of traffic originated and terminated by U.S. carriers serving particular routes.[17] Finally, ATN argues that Commission decisions provide anecdotal evidence of market sectors and individual instances where return traffic has not been allocated among U.S. carriers on a proportionate basis.[18]

17. ATN believes that the Commission has expressed concern about proportionate allocation of return traffic primarily as a part of the Commission's effort to prevent whipsawing of U.S. carriers by foreign correspondents.[19] Thus, ATN argues that further consideration of the return traffic issue should occur primarily in the context of the Commission's settlement policies. In this regard, ATN suggests that the same flexibility which has characterized the International Settlements Policy (ISP) should guide the Commission's inquiry into the return traffic issue. ATN states that it is committed to offer rates to its "target base" of U.S. customers for U.S.-originated service which are lower than AT&T's current rates. Further, ATN suggests that improved service quality and increased traffic volume will result due to ATN's investment in new telephone plant in Guyana. Finally, ATN argues that its return traffic proposal does not represent whipsawing. It explains that whipsawing cannot occur when AT&T is the monopoly carrier at the U.S. end. Moreover, ATN asserts that GT&T has not tried to "play off" AT&T against other potential U.S. carriers. ATN states that a rigid application of the proportionate return principle would hand to AT&T virtually 100% of the growth traffic due to its current monopoly of U.S.-originated traffic.

18. ATN also argues that rigid application of proportionate return traffic policy would serve as an entry barrier for the international telecommunications market in the United States. ATN states that entry into the market of U.S.-originated switched international traffic is largely limited to major domestic "1+" carriers. ATN explains that through a rigid application of proportionate return, the Commission would be awarding by fiat a potentially lucrative stream of international traffic -- the return IMTS traffic -- to carriers based upon their domestic "1+" operations. Short of entering the domestic "1+" market on a nationwide basis through an enormous capital investment, small companies such as ATN can expect only limited market shares for originating IMTS traffic. ATN states that strict adherance to proportionate return would prevent ATN from achieving any return whatsoever and effectively preserve the market as an AT&T monopoly.

19. Finally, ATN argues that "numerous" other interests, including established U.S. government policies in favor of privatization and investment in the Caribbean, would be defeated by a rigid application of the proportionate return concept in situations where U.S. companies acquire a foreign carrier in a developing country and invest millions in developing its infrastructure.

IV. DISCUSSION

20. In this Order, we find that grant of ATN's application will serve the public interest, subject to certain conditions set forth below. At present, only one U.S. common carrier, AT&T, provides direct switched voice service to Guyana. We find that entry by additional U.S. common carriers into the U.S.-Guyana market will provide U.S. consumers additional choice and that the added competition will be in the public interest.

21. We note that ATN is a 100 percent U.S.-owned corporation. Moreover, we recognize that ATN has committed $100 million in capital improvements to the Guyana telecommunications system. Furthermore, we are encouraged by the fact that ATN is prepared to ensure that collection rates in Guyana for calls to the United States will not exceed AT&T's collection rates for similar calls from the United States to Guyana. Finally, we are encouraged by the fact that GT&T states that it will encourage the government of Guyana to open the Guyana telecommunications market to competition in international communications within the next five years and that GT&T is prepared to consider entering into operating agreements with additional U.S. carriers for service between the United States and Guyana.

22. Nevertheless, we continue to be concerned that ATN, through its controlling share of the sole provider of local services in Guyana (GT&T), has exclusive control over bottleneck facilities, and, operating in concert with GT&T, could exclude new entrants into the U.S.-Guyana market and provide unequal interconnection for, or otherwise discriminate against, competing U.S. carriers. Indeed, the available evidence already suggests that GT&T may be prepared to use its market power to exclude new entrants, and otherwise restrict competition in Guyana. MCI, for example, the second largest U.S. international common carrier, indicates that it has been unsuccessful in negotiating an operating agreement for the U.S.-Guyana telecommunications market. Similarly, ATN's proposal to deviate from proportionate allocation of return IMTS traffic from Guyana to the United States traffic further suggests that GT&T might consider employing its market power to disciminate against AT&T and any other U.S. carrier that may enter the U.S.-Guyana market.

23. Therefore, based on the circumstances presented to us here, we find that the public convenience and necessity[20] requires us to place the same conditions on ATN's

Section 214 authorization that the Commission determined in 1985 should be placed on international common carriers classified as dominant.[21] In balancing our interest in promoting additional competition in the U.S.-Guyana market against our concerns regarding ATN's proposed allocation of return traffic and other possible discriminatory practices, we will grant ATN authority to lease and operate 6 voice-grade half-circuits between US Sprint's Franklin, New Jersey earth station and the INTELSAT AOR satellite located at 325.5 degrees East Longitude, connecting with similar circuits between the satellite and an earth station in Guyana furnished by GT&T.[22] ATN will be required to seek additional authorization for the activation of any additional circuits for the provision of switched services between the United States and Guyana. Further, we will require ATN to submit quarterly revenue and traffic reports for service beteween the United States and Guyana. This would include data on all U.S.-outbound and U.S.-inbound traffic carried. These quarterly reports would be filed within 90 days from the end of the calendar quarter. Further, ATN is required to file any operating agreements entered into by themselves or its parent/affiliates that affect traffic and revenue flows to or from the United States and ATN is required to file a tariff pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order. Finally, we note that ATN will also be required to seek specific authorization for the provision of any private line services between the United States and Guyana.

24. In addition to these requirements, the public interest requires that we address the issue of operating agreements to additional U.S. carriers. Therefore, we shall further condition ATN's Section 214 authorization to provide that neither ATN, nor any persons or companies controlling it or controlled by ATN, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ATN or any persons or companies controlling it or controlled by ATN are parties. Moreover, in order to ensure that ATN does not facilitate a deviation from the Commission's policy of proportionate allocation of return traffic, we condition ATN's Section 214 authorization on ATN accepting only its proportionate share of return traffic from Guyana. Although ATN argues that the Commission does not customarily insert into Section 214 authorizations a condition directing carriers to accept only a proportionate allocation of return traffic, we believe it is necessary to condition ATN's Section 214 authorization on acceptance of proportionate return to protect the public interest from any potential anticompetitive consequences that could result from the reallocation of return traffic as proposed by ATN in its application.[23] Further, with respect to ATN's arguments as to why it should be allowed to deviate from existing Commission policy on proportionate return, we believe that the issue is more appropriately addressed in the context of the *Phase II Further Notice of Proposed Rule Making* in Common Carrier Docket 90-337.[24] Thus, in the absence of a Commission decision to permit deviations from the longstanding, internationally accepted principle of proportionate return traffic, we must condition ATN's Section 214 authorization on ATN accepting only its proportionate share of return traffic from Guyana, subject to findings, rules, requests or other actions resulting from the Commission's resolution of Common Carrier Docket 90-337, or other proceedings. We intend to monitor compliance with this condition in our review of ATN's traffic and revenue reports filed, and other information brought before us.

V. ORDERING CLAUSES

25. Upon consideration of the subject application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the acquisition of 6 voice-grade half-circuits from US Sprint for ATN's provision of switched services, including voice, record and data communications services, between the United States and Guyana.

26. Accordingly, IT IS ORDERED that application File No. I-T-C-90-153 IS GRANTED IN PART, and ATN is authorized to:

a. lease and operate 6 voice-grade half-circuits between US Sprint's Franklin, New Jersey earth stations and INTELSAT's AOR satellite at 325.5^0 E.L., connecting with similar circuits between the satellite and an earth station in Guyana furnished by its correspondent;

b. lease 6 voice circuits in the US Sprint earth station at Franklin, New Jersey;

c. lease 6 voice grade circuits between the Franklin, New Jersey earth station and US Sprint's point of presence at 60 Hudson St., New York, New York; and

d. use the authorized facilities to provide only switched services, including voice, record and data communications services, between the United States and Guyana.

27. IT IS FURTHER ORDERED that the applicant is required to seek additional authorization for the activiation of any additional circuits for the provision of switched services between the United States and Guyana.

28. IT IS FURTHER ORDERED that ATN shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international service between the United States and Guyana within 90 days from the end of each calendar quarter.

29. IT IS FURTHER ORDERED that ATN shall comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreement entered into by ATN or its parent/affiliates that affect traffic and revenue flows to or from the United States within 30 days of its execution.

30. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

31. IT IS FURTHER ORDERED that neither ATN, nor any persons or companies controlling it or controlled by ATN, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any

other United States ccarrier by reason of any concession, contract, understanding, or working arrangement to which ATN or any persons or companies controlling it or controlled by ATN are parties.

32. IT IS FURTHER ORDERED that this authorization is conditioned upon ATN accepting only its proportionate share of return traffic from Guyana.

33. IT IS FURTHER ORDERED that this authorization is subject to possible revocation or modification as a result of findings, rules, requirements or other actions resulting from the Commission's resolution of *Regulation of International Accounting Rates*, Phase I Report and Order (released May 23, 1991) and *Regulation of International Accounting Rates*, Phase II Further Notice of Proposed Rule Making (released May 23, 1991), or other proceedings.

34. IT IS FURTHER ORDERED that MCI's request to accept its late-filed comments in this proceeding is GRANTED.

35. IT IS FURTHER ORDERED that ATN's request to accept its late-filed comments in this proceeding is GRANTED.

36. IT IS FURTHER ORDERED that ATN shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

37. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this Order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] On August 14, 1991, ATN informed the Commission that ATN withdraws its request for Section 214 authority to provide private line services to Guyana. *See* Letter from Gertrude J. White and Robert J. Aamoth, Counsel for ATN, to Gerald P. Vaughan, Deputy Bureau Chief, Common Carrier Bureau, FCC (August 14, 1991).

[2] *See Atlantic Tele-Network Company*, 4 FCC Rcd 8302 (Int. Fac. Div. 1989); *Puerto Rico Telecom Corporation*, DA 90-176 (Int. Fac. Div. released June 6, 1990); *erratum*, DA 90-836, (Int. Fac. Div. released June 20, 1990).

[3] Vitelco, the Virgin Islands Telephone Corporation, is the local exchange carrier serving the U.S. Virgin Islands.

[4] *Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982); *recon.* FCC 83-69, released March 21, 1983; Second Further Notice of Proposed Rule Making, FCC 82-187, released April 21, 1982; Third Further Notice of Proposed Rule Making, Mimeo No. 33547, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, 48 Fed. Reg. 46,791 (October 15, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rule Making, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985); *rev'd MCI v. FCC*, 765 F.2d 1186 (1985).

[5] *International Competitive Carrier Policies*, CC Docket No. 85-107, 102 FCC 2d 812 (1985), *on recon.* 60 R.R. 2d 1435 (1986); *recon. denied* FCC 86-339 (1986).

[6] *See* Letter from Gertrude J. White and Robert J. Aamoth, Counsel for ATN to George Li, Chief, International Facilities Division, FCC (October 19, 1990).

[7] *See* Letter from Jodi L. Cooper, Regulatory Attorney, MCI, to Donna R. Searcy, Secretary, FCC (June 28, 1991).

[8] MCI filed a request to accept these late-filed comments in the ATN proceeding; we hereby grant MCI's request.

[9] *See* attachment A, MCI Comments filed August 8, 1991.

[10] On October 1, 1991, MCI filed another letter with the Commission asserting that the Commission should not grant ATN's application unless the Commission classifies ATN as dominant for the provision of service between the United States and Guyana and that the Commission require ATN to guarantee that GT&T will grant operating agreements on a nondiscriminatory basis to additional U.S. carriers. Further, MCI asserts that the Commission should require that ATN submit a sworn written statement assuring that there will be proportionate allocation of return traffic to other U.S. carriers providing service to Guyana. *See* Letter from Jodi L. Cooper, Regulatory Attorney, MCI to Donna R. Searcy, Secretary, FCC (October 1, 1991).

[11] *See* Letter from Gerald P. Vaughan, Deputy Bureau Chief, Common Carrier Bureau, FCC to Gertrude J. White and Robert J. Aamoth, Counsel for ATN (August 7, 1991). The Bureau letter also noted that ATN had repeatedly informed Bureau staff that ATN intends to withdraw the private line portion of its Section 214 application. In response, ATN withdrew its request for Section 214 authority to provide private line services to and from Guyana. *See supra* note 1.

[12] *Regulation of International Accounting Rates*, Phase II Further Notice of Proposed Rule Making, CC Docket 90-337, FCC 91-158 (released May 23, 1991)(*Phase II Further Notice of Proposed Rule Making*). ATN has requested that these comments be accepted in the record of this application. We hereby grant ATN's request.

[13] ATN adds that there were only 20,000 connected access lines in Guyana for a population of approximately 750,000.

[14] ATN states that it is "interested" in encouraging the Government of Guyana to permit competitive entry for international telecommunications services within Guyana during the next five years.

[15] Notice of Inquiry and Proposed Rule Making, 2 FCC Rcd 1022 (1987); Report and Order and Supplemental Notice of Inquiry, 53 Fed. Reg. 12546 (released March 25, 1988); Order on Reconsideration, 4 FCC Rcd 323 (1988).

[16] We note that Section 63.51 of the Commission's rules, 47 C.F.R. § 63.51, provides that "[t]he applicant shall furnish any additional information which the Commission may require after a preliminary examination of the application or request."

[17] *Citing*, "International Communications Traffic Data Report for 1989," Industry Analysis Division, Common Carrier Bureau, FCC, at Section 7 (August 31, 1990).

[18] *Citing International Competitive Carrier Poilices*, 102 FCC 2d 812, 831 (1985); *Interconnection Arrangements Between and Among Domestic and International Record Carriers*, 93 FCC 2d 845, 864 (1983); *TRT Telecommunications Corp.*, 49 FCC 2d 1408, 1411 n.7 (1974).

[19] "Whipsaw" is the term used to describe the ability of the foreign correspondent to utilize its power to play one competing U.S. carrier against other competing U.S. carriers to gain concessions to the detriment of the U.S. public interest. Mackay Radio and Telegraph Company, Inc., 2 FCC 592 (1936) *aff'd by the Commission en banc*, 4 FCC 150 (1937); *aff'd sub nom.* Mackay Radio and Telegraph Co. v. FCC, 97 F. 2d 641 (D.C.Cir. 1938).

[20] Our action in this case rests on our statutory authority under Section 214 of the Communications Act, as amended, "to . . . attach to the issuance of the certificate such terms and conditions as in [the Commission's] judgment the public convenience and necessity may require . . . ." 47 U.S.C. § 214(c).

[21] In the Report and Order in *International Competitive Carrier*, the Commission expressed continuing concerns about the potential for a carrier in the United States that is owned by a foreign telecommunications entity to act in concert with its foreign parent to deny market entry to other U.S. carriers as well as to cause market distortions, such as unequal interconnection and discrimination. 102 FCC 2d at 842. As a result, the Commission classified all foreign-owned carriers as dominant in order to encourage such carrier's foreign parent to grant operating agreements to U.S. carriers and to discourage market entry restrictions, unequal interconnection, and discrimination against U.S. carriers.

The Commission also concluded that noncontiguous domestic carriers should be classified as dominant because they do not currently face effective competition in their markets. The Commission noted, for example, that most of these carriers control the local exchange facilities for the market in question, giving these carriers the ability to exclude meaningful competition through discriminatory practices. *Id.* at 832.

More recently, the Commission proposed conditioning Section 214 authorizations of U.S. international carriers that seek to serve a foreign country in which that carrier has an ownership interest or sufficiently close corporate relation with a carrier that either holds some form of privileged access to that country or otherwise has market power. *Phase II Further Notice of Proposed Rule Making* at para. 16.

[22] This authorization is, however, subject to revocation or modification resulting from the Commission's resolution of Common Carrier Docket 90-337, or any other current or future Commission proceedings addressing the issues raised by this application.

[23] We note that the Commission's interest in the competitive aspects of the allocation of return traffic is not new. Indeed, in the Report and Order in *Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes*, Report and Order, CC docket No. 85-204, 51 Fed. Reg. 4736 (February 7, 1986), the Commission required all filings accompanying waiver requests of the Commission's [International] Settlements Policy to include a statement as to whether changes in the methods of allocating return traffic among U.S. carriers were included in the negotiations leading to the change (in the accounting rate), and if so, to what effect. Further, waiver requests were to include a statement as to whether there was any attempt by the Postal Telegraph and Telephone Administrations (PTT(s)) involved to secure concessions in the accounting rate through any measures (*such as reallocations of return traffic, or other special concessions)* which would indicate whipsawing. *Id.* at Attachment A (*emphasis added).*

More recently, in *Regulation of International Accounting Rates*, CC Docket 90-337, Phase I Report and Order (released May 23, 1991)(*Phase I Report and Order),* the Commission established ISP rules to address potential anticompetitive consequences resulting from, for example, allocation of return traffic to the detriment of the U.S. public interest. *See* 47 C.F.R. § 64.1001. The ISP rules now require, for example, that all ISP filings, whether through notification or waivers, must contain a notarized statement that the filing carrier has not "bargained for, nor has any indication that it will receive, more than its proportionate share of return traffic." *Id.* at § 64.1001(g)(2). *See also Phase I Report and Order* at paras. 14, 20. Moreover, we note that while ATN's application for 214 authority to Guyana preceded the pleading period to the *Notice of Proposed Rulemaking* in CC Docket 90-337, ATN did not file comments regarding the Commission's proposal to require certified statements that there has been no deviation from proportionate allocation of return traffic. *See Regulation of International Accounting Rates*, 5 FCC Rcd 4948, 4949-50 (1990).

[24] The Commission stated that it is "prepared to consider new proposals that depart from the traditional settlement principles, should such parties be able to demonstrate that such proposals would better serve the U.S. public interest." *Phase II Further Notice of Proposed Rulemaking* at note 28.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-91-188

Application for authority to acquire and operate facilities in the TPC-3 and H-J-K Cables.

ORDER AND AUTHORIZATION

Adopted: October 30, 1991; Released: November 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-188 IS GRANTED and GTE Hawaiian Telephone Co., Inc., (HTC) is authorized to:

a. acquire from AT&T, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate 18 64-Kbps circuits in the TPC-3 cable between Hawaii and Japan;

b. acquire from AT&T, on an IRU basis, a one-half interest in and operate 18 64-Kbps circuits in the H-J-K cable between Japan and Korea; and

c. use said facilities to provide HTC's regularly authorized services between Hawaii and Korea[1] and beyond.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The Korea Telecommunication Authority (KTA) will provide the matching half-circuits.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE FLORIDA TELEPORT LIMITED — File No. I-T-C-91-126

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication between the U.S. and the Pan American Satellite (PAS) System for the Provision of International Television Service

ORDER AND AUTHORIZATION

Adopted: October 30, 1991; Released: November 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that its grant will serve the present and future public convenience and necessity.

2. Accordingly, IT IS ORDERED that the application of The Florida Teleport Limited (Florida Teleport), File No. I-T-C-91-126, IS GRANTED and Florida Teleport is authorized to establish channels of communication between existing and future earth stations owned and operated or leased by Florida Teleport in the U.S. and those countries which the Pan American Satellite system is authorized to serve for the provision of international television service.

3. IT IS FURTHER ORDERED that Florida Teleport is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for international television service not interconnected with the public switched message networks (except for emergency restoration services).

4. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

5. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between existing and future earth stations and the PAS-1 satellite does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with this satellite.

6. This authorization is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-121

In the Matter of

Amendment of Part 73 of the
Commission's Rules to Permit
Short-Spaced FM Station Assignments
by Using Directional Antennas.

ERRATUM

Released: November 8, 1991

By the Chief, Mass Media Bureau:

1. This action further extends the period before the effective date for all of the rule amendments adopted in the *Memorandum Opinion and Order* (*Memorandum*)[1] in MM Docket No. 87-121 (FCC 91-273), adopted August 28, 1991, and released on September 17, 1991. The *Memorandum* responded to petitions for reconsideration, reaffirming the Commission's earlier decision to allow routine short-spaced FM broadcast station assignments, and adopting several petitioned refinements to the rules.

2. The period before the effective date is extended again to allow the appropriate time between the date the rules were published in the Federal Register and their effective date. Accordingly, IT IS ORDERED THAT the effective date of the amendments to 47 C.F.R. Sections 73.207, 73.215, and 73.316 IS AMENDED to December 19, 1991.

3. This action is taken pursuant to authority found in Section 4(i) and 303(r) of the Commissions Act of 1934, as amended, and Sections 0.24(b) and 0.283 of the Commission's Rules (47 CFR Sections 0.24(b) and 0.283).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *See Erratum,* MM Docket No. 87-121, adopted October 1, 1991, released October 9, 1991, DA 91-1215.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ASSET MANAGEMENT CORPORATION File No. 10714-CL-P-625-A-89

For facilities in the Domestic Public Telecommunications Radio Frequency Block A, in Market 625, South Carolina 1 - Oconee

CARALE CELLULAR PARTNERS File No. 10945-CL-P-446-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 446, Kentucky 4 Spencer

CENTERCOM COMMUNICATIONS CO. File Nos. 10565-CL-P-334-A-89 10705-CL-P-376-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Markets 334, Arkansas 11 - Hempstead and 376 Georgia 6 - Spalding

DERWOOD CHASE, JR. File Nos. 10069-CL-P-391-A-88 10312-CL-P-404-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Markets 391, Idaho 4 - Elmore and 404, Indiana 2 - Kosciusko

EILEEN MCDONALD File No. 10758-CL-P-501-A-89

For facilities in the Domestic Public Telecommunications Radio Service on Frequency Block A, in Market 501, Mississippi 9 - Copiah

ELLERON CELLULAR CORPORATION File No. 10677-CL-P-726-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 726, Puerto Rico 4 - Aibonito

FRED FARLEY File No. 10110-CL-P-676-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 676, Utah 4 - Beaver

METACOMM CELLULAR PARTNERS File No. 10557-CL-P-326-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 326, Arkansas 3 - Sharp

STEIN CELLULAR PARTNERS File No. 10495-CL-P-431-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on frequency Block A, in Market 431, Kansas 4 - Marshall

SUNFIELD CELLULAR ASSOCIATES File No. 10753-CL-P-496-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 496, Mississippi 4 - Yalobusha

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1991; Released: November 12, 1991

By the Chief, Mobile Services Division:

1. The above captioned non-wireline cellular applicants (with the exception of one) for rural service areas (RSAs) seek reconsideration of the actions by the Mobile Services Division of the Common Carrier Bureau returning their applications as unacceptable for filing. This is the Commission's first action on the application filed by Carale Cellular Partners. The primary reason for return of the applications was their failure to comply with the Commission's financial qualifications rules regarding internal financing. Accordingly, the listed applications are being addressed in this one order.[1]

2. On September 16, 1991 Derwood Chase, Jr. (Chase) filed a "Supplement to Petition for Reconsideration" in which he argues that the current version of the Commission's rule, Section 22.917(c)(6), regarding personal or internal funding of RSA cellular systems, has not been authorized by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act of 1980 (PRA). According to Chase, the Commission could not have properly dismissed his applications for any failure of to comply with an unauthorized information collection by the Commission. No party had raised this issue prior to September 16, 1991.

3. In the *Third Notice of Proposed Rule Making* in CC Docket No. 85-388, 3 FCC Rcd 2591 (1988) (*Notice)* the Commission proposed rules to require RSA applicants to demonstrate their financial qualifications prior to the lottery. The Commission wanted to limit the lottery pool to those who have the financial ability - at the time they file their application - to build and construct the proposed cellular system. Thus, the proposed rule required a firm financial commitment from a recognized bank or other financial institution which demonstrated that the lender had examined the financial condition of the applicant; had determined that the applicant is creditworthy; indicated whether any actions were required of the applicant to continue the commitment in force; and that applicants relying on financing from other than a recognized lending institution prove that the entity had the funds available and uncommitted to another cellular application. This proposed rule was submitted to the Office of Management and Budget (OMB) for approval.[2] The final firm financial commitment rule regarding non-internal financing adopted in the *Fourth Report and Order* in CC Docket No. 85-388, 4 FCC Rcd 2542 (1988) is not substantively or materially changed from the proposed rule.

4. In the *Notice* the Commission also proposed a rule for applicants relying on internal financing. However, the final rule regarding internal financing as adopted in the *Fourth Report and Order*, *supra*, included additional requirements that were substantively and materially different than the proposed rule. Moreover, the final rule did not receive clearance from the OMB, as required. Under these circumstances, we believe that the captioned applications were improperly dismissed.[3] We accept the applicants' post lottery financial commitment filings and reinstate the applications. We have reviewed the post lottery filings and find that the applicants are legally, technically and financially qualified to construct and operate the respective proposed cellular telephone systems. Accordingly, we are granting the applications in this order.

5. Accordingly, IT IS ORDERED THAT the applications of Asset Management Corporation, File No. 10714-CL-P-625-A-89; Carale Cellular Partners, File No, 10945-CL-P-446-A-89; CenterCom Communications Co., File Nos. 10565-CL-P-334-A-89 and 10705-CL-P-376-A-89; Derwood Chase, Jr., File Nos. 10069-CL-P-391-A-88 and 10312-CL-P-404-A-88; Eileen McDonald, File No. 10758-CL-P-501-A-89; Elleron Cellular Corporation, File No. 10677-CL-P-726-A-89; Fred Farley, File No. 10110-CL-P-676-A-88; Metacomm Cellular Partners, File No. 10557-CL-P-326-A-89; Stein Cellular Partners, File No. 10495-CL-P-431-A-89 and Sunfield Cellular Associates, File No. 10753-CL-P-496-A-89 ARE GRANTED.

6. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Edward H. Peter, Jr. and Laurance D. Moon against Carale Cellular Partners IS DISMISSED.

7. IT IS ALSO ORDERED THAT the Petitions for Reconsideration filed by the applicants ARE GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Several of the petitions for reconsideration listed above have been opposed by Thomas Domencich and the Committee for a Fair Lottery (Jointly CFL). Mr. Domencich was a competing applicant in all 428 Block A RSA markets established by the Commission. The Committee for a Fair Lottery is described as a voluntary association of RSA applicants formed for the purpose of monitoring the Commission's cellular lotteries, of which Mr. Domencich is a member. In its oppositions, CFL does not present new evidence and merely expresses support for the decisions returning the applications.

[2] The PRA requires that the Commission obtain OMB clearance for a "collection of information" prior to its becoming effective. 44 U.S.C. §3507(a).

[3] Section 3507 of the PRA protects a person failing to submit an information collection requirement from suffering any penalty because of such failure unless the information collection requirement has been cleared by OMB or the agency has overridden an OMB decision disapproving clearance. 47 USC §3507. OMB rules require that any substantive or material change to an approved information collection requirement be re-submitted for OMB approval. 5 C.F.R. 1320.11(h).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-201

In re Applications of

SCOTT M. TRENTADUE File No. BPH-900604MA

FREDERICK W. KINLOW File No. BPH-900606MF
d/b/a F.W.K.
BROADCASTING COMPANY

For Construction Permit for
New FM Station on Channel 293A,
Whitewater, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1991; Released: November 13, 1991

By the Review Board:

1. Before the Review Board is a Motion For Extraordinary Relief filed by Scott M. Trentadue (Trentadue) on September 25, 1991, pursuant to 47 C.F.R. § 1.301. Comments in support were filed by the Mass Media Bureau on October 2, 1991, and an Opposition was filed by F.W.K. Broadcasting Company (FWK) on October 4, 1991. In his Motion, Trentadue requests that the Board reverse a ruling by Administrative Law Judge Joseph Chachkin (ALJ), which accepted a late-tendered hearing fee by FWK. *Memorandum Opinion and Order*, FCC 91M-2682, released August 30, 1991 (*MO&O*). The Board will refer the matter to the Managing Director for action.

2. In June 1990, Trentadue and FWK filed competing applications for a construction permit for a new FM station in Whitewater, Wisconsin. *See Hearing Designation Order*, 6 FCC Rcd 4438 (MMB, released July 22, 1991). These applications are governed by new Commission Rules that establish new deadlines for tendering hearing fees. *Report and Order*, 6 FCC Rcd 157 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991). In relevant part, the new rules require that commercial applicants, like FWK, whose applications had been "accepted for filing" in a public notice released prior to July 1, 1991, pay their hearing fees by July 15, 1991. FWK was not represented by counsel and did not timely learn of the rule change. It did not tender its fee until August 12, 1991, when it filed its Notice of Appearance and a Petition for Acceptance of Late-Tendered Hearing Fee. The ALJ granted the FWK petition and denied a motion to dismiss FWK's application filed by Trentadue. *MO&O*.

3. Trentadue filed a Motion for Leave to Appeal the ALJ's Order, but was denied. Its Motion For Extraordinary Relief ensued. Trentadue contends that the Managing Director, not the ALJ, should have decided whether FWK's fee could be accepted. The Bureau in its Comments supports Trentadue's positions. FWK, in opposing the Motion, argues that the ALJ's action was not *ultra vires* because FWK did not seek a fee deferral, only late-acceptance of its fee. FWK further argues that the public interest would be served by allowing FWK to prosecute its application since then the public would have a choice between applicants.

4. We will refer this matter to the Managing Director for further action. The issue here -- whether a late-tendered hearing fee should be accepted -- is not a matter over which the ALJ or this Board has authority to act. Rather, the Managing Director, with the concurrence of the General Counsel, has *exclusive* delegated authority to act on fee issues. 47 C.F.R. 1.1115 (c). Thus, the FWK Petition For Acceptance of Late-Tendered Hearing Fee should have been referred to the Managing Director by the ALJ at the outset. *CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990); *Darrell Spann*, FCC 91R-91 (Rev. Bd., released October 18, 1991); *Sam Widge Advertising Limited Partnership*, 6 FCC Rcd 5290 (Rev. Bd. 1991). Insofar as FWK argues that it did not seek fee deferral but only late acceptance, the Commission held in *CSJ* that even requests for extension of time relating to fee requirements must be referred to the Managing Director for consideration. 5 FCC Rcd at 7653.

5. ACCORDINGLY, IT IS ORDERED That the Motion For Extraordinary Relief filed September 25, 1991 by Scott M. Trentadue IS REFERRED to the Commission's Managing Director for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 12, 1991

THE PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA AND FREDERICK & WARINNER FILE APPLICATIONS FOR REVIEW OF COMMON CARRIER BUREAU INTERPRETATION REGARDING THE DIRECT ASSIGNMENT OF COSTS UNDER THE COMMISSION'S PART 36 PROCEDURES

PUBLIC COMMENT INVITED

The Common Carrier Bureau has received two Applications for Review of the Common Carrier Bureau Letter of Interpretation of August 21, 1991. The Letter, issued by the Deputy Chief, Operations, Common Carrier Bureau (6 FCC Rcd 5068 (1991)), clarifies the role of direct assignment in the jurisdictional separations process.

Frederick & Warinner, in its Application for Review filed on September 23, 1991, requests that the Commission rescind this Letter of Interpretation, reinstate its earlier interpretations made in response to two previous waiver requests (2 FCC Rcd 5662 and 5668), and affirm that direct assignment is an effective principle upon which the separations process is built.

The Public Service Commission of the District of Columbia (D.C. PSC), in its Application for Review filed on September 20, 1991, requests that the FCC reverse the interpretation of the Separations Manual and continue to require direct assignment where feasible. The D.C. PSC states that the effect of the Common Carrier Bureau Letter of Interpretation would result in the shift of $4.2 million annual revenue requirements to the District of Columbia intrastate jurisdiction.

Parties may file comments on this petition no later than **December 20, 1991.** Replies should be filed by **January 6, 1992.** Comments should reference AAD 91-48. A copy of each pleading should be sent to Chuck Needy, FCC Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Chuck Needy, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 12, 1991

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY FILES PETITION FOR WAIVER OF A COMMON CARRIER BUREAU INTERPRETATION REGARDING THE DIRECT ASSIGNMENT OF COSTS UNDER COMMISSION'S PART 36 PROCEDURES

PUBLIC COMMENT INVITED

On September 27, 1991 the Chesapeake and Potomac Telephone Company (C&P) filed a petition requesting a waiver of the Common Carrier Bureau interpretation letter of August 21, 1991. C&P requests the waiver in order to permit it to continue the use of its current direct assignment process to separate trunk testing expenses between the interstate and intrastate jurisdictions. The Letter of Interpretation issued by the Common Carrier Bureau (6 FCC Rcd 5068 (1991)) clarifies the role of direct assignment in the jurisdictional separations process.

Parties may file comments on this petition no later than **December 20, 1991.** Replies should be filed by **January 6, 1992.** Comments should reference AAD 91-48. A copy of each pleading should be sent to Chuck Needy, FCC Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits public reference room, 2000 L Street, N.W. Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Chuck Needy, (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NORTHLAND CABLE PROPERTIES SIX LIMITED PARTNERSHIP — File No. PA-89-003

Petition For Temporary Stay of Notice of Removal of Cable Television Facilities from Poles

ORDER

Adopted: November 5, 1991; Released: November 12, 1991

By the Chief, Accounting and Audits Division, Common Carrier Bureau:

1. On September 27, 1989, Northland Cable Properties Six Limited Partnership ("Northland") filed, pursuant to Section 1.1403(b) of the Commission's Rules, the above-captioned petition for a temporary stay of Nantahala Power and Light Company's ("NP&L") notice of removal of Northland's cable television facilities from NP&L's poles. On October 30, 1991, Northland filed a letter requesting dismissal of its petition without prejudice, stating that the stay is no longer needed because NP&L has not taken any recent actions with respect to removing Northland's facilities from its poles.

2. We are satisfied that dismissal of the petition without prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Northland's request for dismissal without prejudice IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 12, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELLSOUTH'S PETITION FOR WAIVER OF COMPUTER II

On October 8, 1991, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a petition for waiver of the Commission's *Computer II* rules to offer Public Telephone Coin Messaging Service (CMS) on an integrated basis. According to BellSouth, CMS allows a caller from a pay telephone to leave a recorded message for subsequent delivery to a party whose telephone is busy or is not answered. BellSouth states that in its region there were 750 million uncompleted coin calls last year and that CMS would enable the completion of tens of millions of these calls. BellSouth adds that the costs of offering CMS on a separated basis would be prohibitive.

BellSouth states that it intends to use the same voice messaging equipment for CMS that is used to provide other voice messaging services pursuant to BellSouth's voice messaging Comparably Efficient Interconnection (CEI) plan. BellSouth adds that, consistent with CEI requirements, it will connect its public telephone service to other enhanced service vendors on the same basis as it connects its own enhanced service. BellSouth states that this waiver request is identical to the waiver request that was recently granted for Bell Atlantic's coin message delivery service. Finally, BellSouth adds that if the Commission should grant this waiver request, BellSouth will not deploy CMS in the state of Georgia prior to the Commission's resolution of the issues pending in BellSouth's Petition for Emergency Relief and Declaratory Ruling Preempting Actions of Georgia Public Service Commission.

Interested parties should file comments on the petition by **November 25, 1991,** and reply comments by **December 10, 1991,** with the FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petitions can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Co. — Transmittal No. 2129

Tariff F.C.C. No. 68

ORDER

Adopted: November 4, 1991; Released: November 12, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. Southwestern Bell Telephone Co. (SWB) filed Transmittal No. 2129 on August 20, 1991, to introduce charges applicable to interexchange carriers (IXCs) that submit unauthorized Primary Interexchange Carrier (PIC) changes to SWB. Transmittal 2129 is scheduled to become effective on November 18, 1991.

2. On September 4, 1991, Capitol Network System, Inc. and NYCOM Information Services, Inc. (CNS/NYCOM), and MCI Telecommunications Corporation (MCI) filed petitions to reject or, in the alternative, to suspend and investigate Transmittal 2129. SWB replied to these petitions on September 16, 1991.

3. CNS/NYCOM argue that SWB's charges do not meet the just and reasonable standard set forth in Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), and are not justified under Section 61.38(b) of the Commission's Rules, 47 C.F.R. § 61.38(b). CNS/NYCOM Petition at 4-5. They also allege that SWB's two-tiered pricing of charges constitutes unreasonable discrimination in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). *Id.* at 7-9. CNS/NYCOM next argue that SWB's charges are an unlawful attempt to punish IXCs for improperly submitting PIC changes. *Id.* at 9-11. CNS/NYCOM further claim that SWB's transmittal is improperly vague because it does not define what is a proper or valid letter of agency (LOA) or who is authorized to sign such a document. *Id.* at 14-15. Finally, contend CNS/NYCOM, SWB refuses to provide IXCs current and accurate customer information necessary to obtain LOAs from authorized persons. *Id.* at 15.

4. MCI argues that Transmittal 2129 should be modified to include the tentative conclusions regarding PIC change verification contained in the Commission's *PIC Change NPRM*.[1] MCI Petition at 3-4. MCI then claims that allowing SWB to seek rate increases on a cost recovery basis for a service excluded from price cap regulation allows SWB to recover more than the overall cost it would have been entitled to recover if rates for all of its regulated services were governed by either rate of return or price cap regulation. *Id.* at 4-5. Finally, asserts MCI, SWB has not provided sufficient cost information under Section 61.38(b) to allow the Commission and interested parties to determine whether the tariff rate is justified. *Id.* at 6-7.

5. SWB replies that its cost support information justifies its charges for unauthorized PIC changes. SWB Reply at 2-3.[2] SWB notes that MCI's claim that excluding unauthorized PIC changes from price caps regulation will permit SWB to recover more than 100 percent of its costs was rejected by the Commission in an earlier decision.[3] *Id.* at 6-7. SWB also argues that its transmittal is not improperly vague. SWB asserts that CNS/NYCOM must bear the responsibility for verifying that its new customers have authority to sign the LOA. *Id.* at 7.

6. The Common Carrier Bureau has reviewed the SWB transmittal and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Southwestern Bell Telephone Co. Tariff F.C.C. No. 68, Transmittal No. 2129, filed by Capitol Network System, Inc. and NYCOM Information Services, Inc., and MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*).

[2] On October 8 and October 11, 1991, SWB provided additional cost information to support its proposed charges. On October 24, 1991, at the Bureau's request, SWB filed Application No. 278 to request a waiver of Section 61.38(b)(1)(i).

[3] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(LEC Price Caps Order), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC,* No. 91-1279 (D.C. Cir. June 14, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications — Transmittal No. 181

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: November 4, 1991; Released: November 12, 1991

By the Deputy Bureau Chief (Policy), Common Carrier Bureau:

1. On August 15, 1991, US West Communications Inc. (US West) filed Transmittal No. 181 to define the application of access charge rate elements to traffic that has been transmitted to US West through Type 1 and Type 2 connections between US West and a Radio Common Carrier (RCC), including cellular carriers.[1] Description and Justification at 1-2. For Type 1 connections, the switched access customer will be assessed local transport and local switching. The appropriate local transport rate, either premium or transitional, will be charged depending on the equal access capability of the US West end office that is used. For Type 2 connections, US West will charge the customer only for local transport and that will be charged at premium rates. *Id.* at 1-3.

2. On August 30, 1991, MCI Telecommunication Corporation (MCI) filed a petition to reject Transmittal 181. MCI argues that since, under the terms of the tariff, US West will always charge premium rates for local transport, Transmittal 181 violates Section 69.105(b) of the Commission's Rules, 47 C.F.R. § 69.105(b)(1)(i), which only allows premium rates to be charged when the end office being used has been converted to equal access. MCI Petition at 2. According to MCI, US West will be charging premium rates for local transport with interconnections through end offices serving the MTSO which have not been converted to equal access, and thus the transmittal violates the Commission's rules. *Id.* at 2-3. MCI suggests that the tariff be changed to state that US West will assess premium or non-premium rates. *Id.* at 3.

3. In its reply comments, filed on September 12, 1991, US West responds that MCI fails to distinguish between Type 1 and Type 2 connections. US West Reply at 2. US West states that for Type 1 connections it will charge transitional rates for local transport if the US West end office serving the MTSO has not been converted to equal access. For Type 2 connections, US West will assess premium transport, which it argues is consistent with the intent of and the letter of the Commission's rules. *Id.* at 2-3. US West explains that with Type 2 connections the RCC interconnects with the access tandem in Feature Group C or Feature Group D protocol, which, according to US West, is equivalent to equal access. Finally, US West argues that it has no control over, or knowledge of, whether the RCC provides equal access. *Id.* at 4.

4. The Common Carrier Bureau has reviewed US West Transmittal 181, the MCI petition, and the US West reply. We conclude that no compelling argument has been presented that the tariff, as revised, is so patently unlawful as to warrant rejection, and that no question has been raised which warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject filed by MCI Telecommunications Corporation against US West Communications Tariff F.C.C. No. 1, Transmittal No. 181, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

[1] In a Type 1 connection the RCC mobile telephone switching office (MTSO) interconnects with a local exchange company (LEC) Class 5 office. In a Type 2 connection the MTSO acts as a class 5 office and interconnects with a LEC access tandem. *See* Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, 2 FCC Rcd 2910, 2914 (para. (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Susquehanna Radio Corp.
(Assignor)

and File Nos. BAL-910617GU
BALH-910617GV

Paxson Broadcasting of Tampa, L.P.
(Assignee)

For Assignment of licenses of
WTKN(AM), Pinellas Park, Florida
and WHVE(FM), Sarasota, Florida

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1991; Released: November 12, 1991

By the Commission:

1. The Commission has before it the above-referenced applications for assignment of the licenses of WTKN(AM), Pinellas Park, Florida, and WHVE(FM), Sarasota, Florida from Susquehanna Radio Corp. ("Susquehanna") to Paxson Broadcasting of Tampa, L.P. ("Paxson"). Lowell W. Paxson owns all of the stock of Paxson Enterprises, Inc., the general partner of Paxson. Mr. Paxson also has an attributable interest in HSN Broadcasting of Tampa, Inc., the licensee of WBHS(TV), Tampa, Florida.[1] Since the Grade A contour of WBHS(TV) encompasses the entire communities of Pinellas Park and Sarasota, a grant of the assignment applications would result in the common ownership of a television station and radio stations in the same market in violation of 47 C.F.R. Section 73.3555(b), the Commission's one-to-a-market rule.[2] Paxson requests a waiver of the rule in connection with the proposed assignment applications. The waiver request is unopposed.

2. In support of its waiver request, Paxson relies on the Commission's decision generally to permit television-radio combinations which meet the "Top 25 Markets/30 Voices" test set forth in *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules ("Second Report and Order")*, 4 FCC Rcd 1741 (1989), *reconsidered in part*, 4 FCC Rcd 6489 (1989). In particular, Paxson states that the Tampa-St. Petersburg market, which includes Lakeland and Sarasota, is the 13th largest ADI television market, serving 1,357,700 ADI households. According to an exhibit provided by Paxson, there will be 41 separately owned or operated broadcast stations in the Tampa-St. Petersburg area in existence after the assignments are consummated.

3. In the *Second Report and Order*, the Commission determined that waivers of the "one-to-a-market" rule, under certain circumstances, would be in the public interest. One such circumstance is where a radio-television combination is located in a major market with many competing voices. In establishing this waiver policy, the Commission stated, "we will look favorably upon waiver requests when the radio and television stations involved are located in the top 25 ADI television markets as defined by Arbitron Ratings Company and in addition where, following the proposed combination, there will be at least 30 separately owned, operated and controlled broadcast licensees or 'voices'." *Second Report and Order*, 4 FCC Rcd 1741, 1751 (1989). In determining the number of "voices", the Commission will count full power commercial and noncommercial television stations and AM and FM stations operating in the same area. *Id.* As we have previously stated, "the advantages of permitting radio-television combinations in the top 25 markets, which have numerous competing voices, generally would not undermine the benefits derived from the Commission's traditional procompetitive and diversity policies." *The Helen Broadcasting Co. Limited Partnership*, 5 FCC Rcd 2829, 2833 (1990).

4. In this case, Paxson has shown that the Tampa-St. Petersburg area, which includes Lakeland and Sarasota, is the 13th largest ADI television market and that there will be at least 41 separately owned or operated broadcast stations in the area. Thus, Paxson's waiver request has provided the necessary documentation to meet the "Top 25 Markets/30 Voices" standard and to demonstrate that waiver of the rule is warranted. Furthermore, we find that the applicant is legally, financially, and otherwise qualified, and that a grant of the assignment applications would serve the public interest.

5. Accordingly, IT IS ORDERED, That the request for waiver of the Commission's one-to-a-market rule, 47 C.F.R. § 73.3555(b), IS HEREBY GRANTED, and the applications for assignment of the licenses of WTKN(AM), Pinellas Park, Florida, and WHVE(FM), Sarasota, Florida, from Susquehanna Radio Corp. to Paxson Broadcasting of Tampa, L.P. ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] According to the applicant, Mr. Paxson directly and indirectly owns approximately 32% of the common stock of Home Shopping Network, Inc. ("HSN"). HSN Communications, Inc., a wholly-owned subsidiary of HSN, is the parent corporation of HSN Broadcasting of Tampa, Inc.

[2] Section 73.3555(b) of the Commission's Rules prohibits the common ownership of radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompasses the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-580

In re Applications of

SAFE BROADCASTING CORPORATION — File No. BPH-871022MC

TRI-STATE BROADCASTING COMPANY — File No. BPH-871023MJ

For Construction Permit for
New FM Station, Channel 239A,
Trion, Georgia

Appearances

Robert S. Stone, on behalf of Safe Broadcasting Corporation; and *Dennis J. Kelly*, on behalf of Tri-State Broadcasting Company.

DECISION

Adopted: October 23, 1991; Released: November 13, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board are the *Initial Decision*, 5 FCC Rcd 381 (1990) (I.D.), and the *Supplemental Initial Decision*, 6 FCC Rcd 5227 (1991) (S.I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions and replies thereto filed by the captioned parties.

2. Following oral argument (on June 30, 1990), and review of the exceptions and replies to the I.D., the Board, by *Memorandum Opinion and Order*, 5 FCC Rcd 4917 (Rev. Bd. 1990), remanded this proceeding to the ALJ on the following issues with respect to the winner below, Tri-State Broadcasting Company (Tri-State):

> 1. To determine whether Tri-State has properly prepared and maintained its local public inspection file pursuant to 47 CFR §73.3526, and the effect thereof on that applicant's basic qualifications to be a Commission licensee; and,
>
> 2. To determine whether Tri-State intentionally made misrepresentations to the Commission and/or the general public by the submission (or the placement in the WGTA local public inspection file) its "issues/programs" lists, and the effect thereof on that applicant's basic qualifications to be a Commission licensee.

In so doing, we indicated that we could not resolve this proceeding on the record then before us in light of the substantial and material questions of fact remaining to be resolved concerning representations made by Tri-State in support of its claim for an additional comparative preference based upon its "unusually good" past broadcast record achieved during the operation of WGTA (AM), Summerville, Georgia.

THE REMAND PROCEEDING

3. In the S.I.D., the ALJ resolved both disqualifying issues in favor of Tri-State. With respect to Issue 1, the ALJ determined that Tri-State's public file contained all basic and required documents, S.I.D., para. 3, and that it was the regular practice of William B. Farrar, the 100% stockholder of Tri-State and General Manager of WGTA (since 1950) to place copies of the documents in the public file contemporaneously with (1) their filing with the FCC; (2) receipt of letters from the public; and (3) requests for time from political candidates. The ALJ also found with respect to the WGTA "issues/problems" lists, the station's practice was to prepare each list and place it in the public file within 10 days of the end of each quarter for which the list was prepared (*see* Tri-State Exh. 17, p. 2). The ALJ also noted that, in addition to the public file, WGTA prepared and maintained daily program logs, and that Tri-State has in its possession, either at the studios of WGTA or in storage, 41 years' worth of (or nearly 15,000) daily program logs retained by WGTA since the station's inception. These logs are, and have been, always available for Commission inspection.

4. In further consideration of the preparation of the "issues/problems" lists and their placement in the WGTA public file, the ALJ also determined that (S.I.D., paras. 9-10):

> Since the deregulation of radio in April, 1981, WGTA has not conducted a "formal" ascertainment, but its owner, Farrar, has personally kept abreast of the problems, interests and needs of the listening public. As the General Manager of station WGTA, Farrar is involved in selling advertising time, visiting clients. During these visits, local affairs are discussed. He regularly attends Chamber of Commerce meetings, and he is head of the local Chamber of Commerce's charitable foundation. He is an elder in his church. In other words, his community awareness and ascertainment of community needs is based upon his participation in the life of the Chattooga County community (Tri-State Ex. 17, p. 4).
>
> Based upon informal ascertainment efforts, Farrar made a conscious decision to use the broad categories of issues that he had developed in the 1978 ascertainment and renewal application process. He did so because in his view, these broad categories have aptly summarized the problems in his community over the years, and they continue to do so (Tri-State Ex. 17, p. 4). Farrar characterized these broad categories as his service area's "gross needs" (Tr. 217). Chattooga County is a rural county. It has had virtually no increase in population in twenty years (the 1990 Census shows an increase of approximately 200 persons over the 1980 Census). WGTA's public affairs programming over the years has been geared to deal with various aspects of these

broad issue categories (Tri-State Ex. 17, p. 4). It is Farrar's opinion that there has been very little change in the "gross needs" of Chattooga County (Tr. 294). Farrar explained that "the changes take place in the programs themselves. The categories stay the same" (Tr. 295).

5. Based upon these findings, the ALJ concluded with respect to the "public file" issue (*id.*, at para. 22):

> The evidence is uncontroverted that Tri-State has continuously maintained a public file, that Tri-State has faithfully inserted into the file the materials required by Section 73.3526 including annual and quarterly issues programs lists, and that Tri-State made the public file available within a reasonable period of time to [a Safe principal], the only person who sought inspection of WGTA's public file. Thus, unlike *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *rev. den.*, 4 FCC Rcd 2553 (1989), 4 FCC Rcd 6312 (1989), [*aff'd by judgment*, No. 89-1552 (D.C. Cir. December 18, 1990)], cited by Safe as support for Tri-State's disqualification, there is no evidence of harassment and intimidation of persons seeking to inspect WGTA's public file, nor is there evidence that Tri-State manufactured its issues/programs lists or other public file materials after the fact.

6. With respect to Issue 2 ("misrepresentation"), the ALJ determined (*id.*, at paras. 16-21):

> Tri-State filed a "Threshold Showing of Unusually Good Past Broadcast Record" on February 22, 1989 in this proceeding. That pleading consisted mainly of a narrative, two randomly selected weeks of WGTA program logs, and copies of WGTA's "issues/programs" lists as placed in the WGTA public file (Safe Ex. 5).
>
> Tri-State's materials submitted with the "Threshold Showing" were inaccurate to the extent that the recorded public affairs programs "Prime Time" and "University of Georgia Almanac" were listed on the "issues/programs" lists during certain quarters after those programs ceased to air (Safe Exs. 6-7). In the case of "Prime Time", its final run over WGTA was August 29, 1987; as to "University of Georgia Almanac", its final run over WGTA was March 26, 1985 (Tri-State Ex. 17, p. 6). The programs, however, continued to be listed by Tri-State in its quarterly lists through the end of 1988 (Safe Ex. 7).
>
> Farrar personally prepared WGTA's issues/programs lists until Margaret Dillard, WGTA's program director, assumed the task (Tr. 215). When Dillard took over, he provided her with a copy of the prior quarterly list. He instructed her to make notations in pencil when she became aware of any program changes and to verify changes which he identified (Tr. 311-313). Dillard has physically prepared the lists since December, 1984. Upon their completion, she typically would make a copy of the list, and put one copy on Farrar's desk and the other copy in the public file (Tri-State Ex. 17, p. 3; Tr. 361-362). Farrar, who is responsible for all programming decisions on WGTA (Tr. 253-255), reviewed each of these lists before the lists were inserted in the public file (Tr. 253). If any changes were needed to the lists, Farrar would tell Dillard or indicate to her what changes needed to be made (Tr. 361-362). Farrar relied on the public affairs and PSA ledger sheets as well as his personal knowledge in determining when changes were required (Tr. 257, 355-356).
>
> In preparing the issues/programs lists, Dillard has used the standard list of issues, discussed, *supra*, given to her by Farrar, Dillard prepared the station logs and was in a position to know what programs were on the station on a daily basis (Tr. 370). However, in preparing the quarterly lists, she did not review the station logs or ledger sheets. Because WGTA's programming was stable, Dillard got in the habit of using the previous quarter's list to generate the new list. On a number of occasions, she "Xeroxed" the preceding quarter's program lists for purposes of compiling the new issues/programs list. She was under no direction from Farrar to do this. Farrar never told Dillard to list any programs which did not air on WGTA (Tri-State Ex. 18, p. 1; Tr. 369-370). Dillard stated that the errors on the lists were made through her own negligence, but that she had no intention to deceive either Farrar or the Commission (Tri-State Ex. 18, pp. 1-2). When the errors in the quarterly lists were brought to his attention in 1989, Farrar instructed Dillard that in the future all such lists will be prepared solely from an examination of the WGTA daily program logs (Tri-State Ex. 7, p. 6).
>
> Farrar also admitted negligence on his part in overlooking the discontinued programs and took responsibility; he apologized to the Commission. When "Prime Time" and "University of Georgia Almanac" went off the air, Farrar overlooked [their] absence from the ledger sheet and failed to make the appropriate deletions. As time went on, his error was compounded (Tri-State Ex. 17, p. 6; Tr. 314).
>
> Farrar asserted that while he had made mistakes he had no intention to deceive the Commission, either with respect to WGTA's programming or in the preparation of the "Threshold Showing" filed by Tri-State to adduce evidence as to its superior past broadcast record. Farrar stated that Tri-State had nothing to gain by seeking to mislead the Commission. Tri-State was not attempting to pad its listings or claim credit for programs not broadcast. He claimed it was merely a record-keeping error. The error was compounded when the errant issues/problems lists were appended to the "Threshold Showing" (Tri-State Exh. 17, pp. 6-7).

7. The ALJ ultimately concluded (*id.*, at paras. 28-30):

> Issue 2 calls for a determination whether Tri-State intentionally made misrepresentations in connection with its issues/programs lists. To establish a misrepresentation, there must be evidence of intentional deception. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (Rev. Bd. 1982), *affd. in part*, 93 FCC 2d 127 (1983). There is no evidence of intentional deception.

Issue 2 concerns two matters. The first matter involves Tri-State's continued listing of the same problems. It has been determined that Tri-State acted in good faith. There is no basis for concluding that Tri-State engaged in intentional deception.

The second matter concerns the inclusion in the quarterly lists of programs which had ceased running on the station. The evidence shows that Farrar was negligent in permitting these errors to occur. Farrar has taken steps to insure that the errors don't reoccur by requiring Dillard to prepare the quarterly lists solely from an examination of the WGTA daily program logs. There is no evidence, however, that the inaccuracies resulted from intentional deception on the part of Farrar and his employees. Significantly, WGTA's program logs were not altered to reflect the continued carriage of the programs. As noted by Tri-State in its Conclusions (paragraph 13) the issues/programs list for the October-December, 1986 period contained in the "Threshold Showing" was contradicted by the program logs for the last week of October, 1986, which showed that "University of Georgia Almanac" did not run that week. The fact that Farrar took no steps to cover up his including of the programs which had ceased running in the quarterly lists convincingly establishes the absence of an intent to deceive. Moreover, there is no conceivable motive for Tri-State to falsify the quarterly lists since excluding the programs from the quarterly lists would not have materially affected Tri-State's "Threshold Showing."

8. In resolving both disqualifying issues in Tri-State's favor, the ALJ heard the testimony of William B. Farrar, Mrs. Aleta Kellet ("a WGTA employee"; *id.*, at para. 5), and Margaret Dillard ("WGTA's Program Director"; *id.*, at para. 18). He ultimately opined that: "The Presiding Judge is convinced that their testimony was truthful and entitled to full credence." *Id.*, at para. 30.

9. In its Exceptions, Safe finds fault with virtually every aspect of the *S.I.D* It maintains that the Tri-State "issues/programs" lists were photocopies and were false; that Tri-State's conduct violates "the letter and spirit" of 47 CFR § 73.3526; that Tri-State's sought-after comparative preference for an "unusually good past broadcast record" was based on false and misleading "issues/programs" lists; and that the ALJ should not have credited the testimony of the three Tri-State witnesses because of discrepancies in their statements. Having reviewed the record *de novo*, we find Safe's exceptions to be without merit. Tri-State and its principal (Farrar) have candidly conceded that mistakes were indeed made, arising principally from inattention to detail; that photocopies of "issues/problems" lists were inserted in the public file; and that the same (or similar) "issues/problems" were repeated throughout several years. As to the witnesses' testimony, we find that the discrepancies involved no more than insignificant differences as to the events surrounding Adams' visit to WGTA to inspect the public file. We also find that the ALJ carefully weighed the evidence adduced at hearing and examined every facet of the claims before him; that there was no intent to deceive demonstrated whatsoever by Tri-State, *see Fox River Broadcasting, Inc., supra* ; that the WGTA public inspection file was properly maintained pursuant to 47 CFR § 73.3526; and that there is no evidence of any harassment or intimidation of persons seeking to inspect the WGTA public file which could support Tri-State's disqualification pursuant to *Catoctin Broadcasting, supra. See also Arkansas Educational Television Commission*, 6 FCC Rcd 478 (1991) (licensee fails to keep *any* "issues/problems" lists for entire license term; subsequently discloses delict to Commission; Commission renews licenses, holding non-compliance not sufficient to hold hearing on renewal, and that "it appears that there was no intent on [the licensees] part to either violate the rule or misrepresent to the Commission its failure to comply").

10. Further, on the record before us, we discern no basis for disregarding the ALJ's credibility determinations with respect to Tri-State's witnesses. While we have, on infrequent occasion, overturned such findings, *see e.g., Richardson Broadcasting Group*, 5 FCC Rcd 5285, 5287 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 6364 (1990), *recon. aff'd* , 5 FCC Rcd 6964 (1990), the Board is generally enjoined to defer to the credibility findings of an ALJ. *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *recon. granted in part and denied in part and review granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989) (table), and it does so regularly where substantial evidence supports those findings. *See e.g., Cannon Communications Corp.*, 5 FCC Rcd 2695, 2700-2703 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 570 (1991), *recon. denied*, 6 FCC Rcd 3310 (1991); *Advanced Broadcast Technologies, Inc.*, 5 FCC Rcd 1960, 1964 (Rev. Bd. 1990), *aff'd* , 5 FCC Rcd 7651 (1990); *Adlai E. Stevenson IV*, 5 FCC Rcd 1588, 1589 (Rev. Bd. 1990); *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1169-1173 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990), *review denied*, 5 FCC Rcd 6232 (1990); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 927 (Rev. Bd. 1991).

11. We affirm the S.I.D. and conclude that Tri-State (and its principal, William B. Farrar) are fully qualified to be Commission licensees.

COMPARATIVE FACTORS

12. Pursuant to the Commission's *Comparative Policy Statement on Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement)*, the ALJ made specific findings with respect to both applicants on the key criteria of diversification of mass media interests, ownership integration into management, local residence/civic activities, past broadcast experience, and installation of auxiliary power.

13. *Diversification*: Both Safe and Tri-State, at the time the I.D. was released, were licensees of other broadcast facilities: Safe owned WSAF (AM) (daytime-only), Trion, Georgia; Tri-State is the licensee of WGTA (AM), Summerville, Georgia (situated approximately five miles south of Trion) I.D., paras. 6, 15, 19. Both Farrar and Adams timely promised to sever all relationships with these extant broadcast facilities.[1] No diversification demerit was assessed either applicant by the ALJ.

14. *Integration*: Terry R. Adams is President, Treasurer, Director, and 100% shareholder of Safe. I.D., para. 5. Adams will be General Manager of Safe's proposed FM station, devoting full-time to such activities. *Id.*, at para. 7. William B. Farrar is President, Treasurer, Director, and 100% shareholder of Tri-State. *Id.*, at para. 13. Farrar will

devote full-time as General Manager of Tri-State's proposed facility. *Id.*, at para. 16. Both Farrar and Adams received full 100% integration credit in the I.D.

15. *Local residence/Civic activities*: Farrar moved to Summerville, Georgia in 1919. After receiving a B.S. degree from Duke University in 1938, he moved from Summerville, but returned in 1948, where he has continuously resided through the present. *Id.*, at para. 18. Adams was born in Trion, Georgia in 1957 (where he resided until age 5). He also resided in Trion between 1983 and 1987; otherwise, he has been a resident of Summerville. He does not propose to move to Trion if Safe is the successful applicant. *Id.*, at para. 8. The ALJ also found that Farrar has a record of local civic activities dating back to 1953. Adams' civic activities date principally from only 1985, although from 1973-1983 he served as leader of the "Royal Ambassadors" in his local church. *Id.*, at paras. 10, 21-22, 26.

16. *Past broadcast experience*: Adams was General Manager of WSAF from 1985 through the hearing proceedings. He was an announcer and public affairs director at WRIP/WOWE radio stations in Rossville, Georgia from 1973 through 1976. He had apparently also worked for Tri-State at WGTA as a part-time announcer for nine months in 1982. *Id.*, at para. 9. Farrar has been the General Manager of WGTA since August 27, 1950. *Id.*, at para. 20.

17. *Auxiliary Power*: Both Safe and Tri-State propose to install auxiliary power generation equipment. *Id.*, at paras. 11, 23.

18. The ALJ ultimately concluded that both applicants were equal with respect to diversification, integration, and auxiliary power. However, Tri-State was determined by the ALJ to be the comparatively preferred applicant in light of its superior qualitative attributes under the *Policy Statement's* local residence/civic participation and past broadcast experience criteria. Indeed, the ALJ concluded that "Safe does not exceed Tri-State in any criterion." *Id.*, at para. 26.

19. Tri-State does not except to any aspect of the ALJ's comparative analysis. Conversely, Safe (as it did with respect to the S.I.D.) excepts to virtually every aspect of the ALJ's comparative considerations. In pertinent part, Safe claims that the ALJ erred in (1) failing to award Safe a comparative preference for the local area residence of its principal; (2) failing to award Safe a comparative preference for participation in civic activities; (3) failing to award Safe a comparative preference for past broadcast experience; and (4) failing to conclude that Safe's integration proposal is inherently more credible, reliable, and meaningful than that of Tri-State's proposal.

20. With respect to Tri-State's integration, Safe essentially claims that Farrar is too old and too sick to operate his proposed facility. The ALJ opined that "Safe has not profferred medical evidence raising doubt as to Farrar's ability to fulfill his integration commitment." *Id.*, at para. 25. We agree, and find Safe's argument to be no more than speculative. There is no record evidence to support Safe's contention. *See Vacationland Broadcasting Company*, Inc., 97 FCC 2d 485 (Rev. Bd. 1984) (subsequent history omitted).

21. Safe would bifurcate, and treat as separate enhancement factors, "local residence" and "civic activities." However, the Commission recently held that "we have considered civic activities as part of an applicant's local residence without having to address how disparities in those factors are to be weighed against each other." *Ronald Sorenson*, 6 FCC Rcd 1952 (1991); cf. *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-1263 (1982). Safe also claims in its Exceptions that its principal's (Adams) residence in Trion during approximately four years of his adult life should outweigh Farrar's 56-year residence in Summerville, a community only five miles south of Trion (where Adams himself currently resides and intends to continue to reside, even in the event of a grant to Safe). We agree with the ALJ that Farrar's significantly longer service area residence (and long-term participation in civic activities) results in a comparative preference for Tri-State. *See Vacationland, supra; Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (Rev. Bd. 1989); *Absolutely Great Radio, Inc.*, 56 RR 2d 261, 262 n. 3. (1984) (subsequent history omitted) (residence preference to applicant whose 85% owner "had resided in service area" for some 20 years *versus* competitor's owners, who lived in community of license for some seven years). With respect to the civic activities as part of this enhancement factor, Safe argues that Farrar's civic participation "which dated back to 1953, ended in 1959, over 30 years ago." Safe Exceptions, at para. 22. Safe's civic activities date back to only 1985. *Id.*, at para. 23. We agree with the ALJ that Tri-State is entitled to a comparative preference for local residence/civic participation. The record reflects that Farrar has continuously resided in the area for nearly 50 years, and has participated in area civic activities "dating back to 1953" to the present. *Id.*, at para. 26. Additionally, Farrar's civic involvement "has been more extensive and Farrar has held more leadership positions." *Id.; see also Radio Jonesboro, Inc., supra.* As a result, Safe's exceptions with respect to this enhancement consideration are denied.

22. With respect to past broadcast experience, Safe claims that "absolutely no preference can be awarded Tri-State based upon the relative broadcast experience had by Farrar as opposed to Adams" because both individuals "have devoted the majority of their adult lives to broadcasting." Safe Exceptions, at para. 24. The record reflects that Safe's principal, Adams, was "public affairs director and announcer" at WRIP/WOWE, Rossville, Georgia for approximately three years (between 1973 and 1976). In 1982, he apparently "returned" to broadcasting for some nine months as a part-time announcer at Tri-State's WGTA. He did not become General Manager of Safe's WSAF until 1985. Conversely, Farrar has been the active full-time General Manager of WGTA for 41 consecutive years. We agree with the ALJ that Tri-State is clearly preferred with respect to this comparative aspect of its application. *See Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 441, 454 (Rev. Bd. 1985), *review denied*, 59 RR 2d 1267 (1986); *Radio Jonesboro, Inc.*, 96 FCC 2d 1106 (Rev. Bd. 1984), *rev. denied*, 100 FCC 2d 941 (1985).

CONCLUSIONS

23. Tri-State has demonstrated that it is qualified to be a Commission licensee and that it is comparatively superior to Safe.[2] We affirm the ALJ's determination that Tri-State's qualitative attributes are superior under the local residence/civic participation, and broadcast experience criteria of the Commission's *Policy Statement*. Both applicants are equal with respect to diversification and

auxiliary power considerations; thus, Tri-State, as the comparative winner, will receive the construction permit at contest here.

24. ACCORDINGLY, IT IS ORDERED, That the Petition For Leave to Amend, filed by Safe Broadcasting Corporation on June 4, 1990, IS GRANTED, and that its amendment (reflecting the assignment of license of WSAF (AM)) IS ACCEPTED; and,

25. IT IS FURTHER ORDERED, That the Motion to Dismiss, filed by Tri-State Broadcasting Company on September 11, 1991, IS DISMISSED as moot; and,

26. IT IS FURTHER ORDERED, That the application of Safe Broadcasting Corporation (File No. BPH-871022MC) IS DENIED, and the application of Tri-State Broadcasting Company (File No. BPH-871023MJ) for a new Class A FM station at Trion, Georgia IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Safe filed a Petition for Leave to Amend on June 4, 1990, to reflect the consummation of the assignment transaction of WSAF (AM) from Safe to Denise Fisher. The Commission approved the proposed assignment of license of WSAF (AM) on March 29, 1990 (File No. BAL-891016EB).

[2] In light of Tri-State's comparative superiority, we need not reach (1) Tri-State's additional claim for a comparative preference based upon WGTA's past broadcast record; or (2) Tri-State's Motion to Dismiss based upon alleged financial deficiencies of Safe (which would otherwise require designation of an appropriate financial issue and an additional remand of this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-312

In re Applications of

PLEASANT HOPE BROADCASTING CO., L.P.	File No. BPH-871209MB
KOYLE BROADCASTING CORPORATION	File No. BPH-871210MD
MINORITIES BROADCASTING COMPANY OF MISSOURI, INC.	File No. BPH-871210ME
MULTICOM BROADCASTING, INC.	File No. BPH-871210MF

For Construction Permit for
New FM Station, Channel 238C2,
Pleasant Hope, Missouri

Appearances

Vincent J. Curtis, Jr. and *Anne Goodwin Crump*, on behalf of Pleasant Hope Broadcasting Co., L.P.; *Dennis P. Corbett* and *Sally A. Buckman*, on behalf of Koyle Broadcasting Corporation; *Stephen Diaz Gavin*, on behalf of Multicom Broadcasting, Inc.

DECISION

Adopted: November 1, 1991; Released: November 13, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. The Review Board has under consideration an *Initial Decision*, 6 FCC Rcd 1785 (1991) (*I.D.*), by Administrative Law Judge Edward Luton (ALJ), granting the application of Pleasant Hope Broadcasting Co., L.P. (PHBC) for a new FM broadcast station at Pleasant Hope, Missouri; the Exceptions and Replies of Koyle Broadcasting Corporation (Koyle) and Multicom Broadcasting (Multicom); and the Reply brief of PHBC.[1] Oral argument was held before the Board on July 26, 1991.

2. The selection of PHBC turned on the standard comparative issue. Under the relevant criteria, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*), PHBC was preferred because of its quantitative superiority of ownership/management integration: 60% *versus* 20% for Koyle.[2] Koyle also received a slight-to-moderate diversification demerit because the ALJ attributed the outside media interests of its nominally passive owner to the applicant upon determining that the "passive" owner actually controlled the applicant. *See generally Daytona Broadcasting Co., Inc.*, 103 FCC 2d 931, 934-935 (1986) (media interests of passive owners not cognizable for diversification purposes *unless* nominal passive principal activity engages in the applicant's decision-making processes). The ALJ ranked Multicom third because that applicant proposed no ownership/management integration and owned other broadcast interests, for which interests it was accorded a slight-to-moderate diversification demerit.

3. Conceding its inferior comparative posture *vis a vis* PHBC, Multicom contends that the ALJ erred, first, in failing to specify financial qualifications and financial certification issues against PHBC; and, second, in awarding Koyle 20% integration credit. Multicom argues that Koyle is a "sham" applicant and that, under Commission precedent, entitled to no integration credit. Koyle, in turn, seeks a total discounting of PHBC's integration credit, restoration of its own 100% claimed integration credit and expungement of the diversification demerit, as well as the specification of financial issues against PHBC. Based on our review of the *I.D.*, the underlying record before us, and the oral argument, we (1) adopt the ALJ's findings of fact, except as modified herein; (2) reject the argument that the proceeding should be remanded on financial and false certification issues against PHBC; and (3) affirm his grant of PHBC's application. We turn first to PHBC's comparative proposal.

PLEASANT HOPE BROADCASTING CO., L.P.

4. *Comparative Issue*. PHBC is a limited partnership, comprised of one "general" partner, Larry Mitchell, who proposes to work fulltime as the station's general manager and chief engineer, and one "limited" partner, Noel Boyd. *I.D.*, paras. 3, 9-10. The ALJ's award of less than the 100% integration credit claimed by PHBC resulted because, on the date the comparative proposals were frozen (*i.e.*, the last day for filing amendments as of right), PHBC's application listed three principals, Mitchell, Boyd, and one Paula Landers, with respective ownership interests of 60%, 20%, and 20%. *Id.*, para. 3.[3] The ALJ found that Mitchell had prepared the application (save the engineering) without the assistance of counsel and that, although Boyd and Landers never intended to take an active role in the management of the station, Mitchell himself "had no clear idea of the characteristics of a limited partnership when he prepared the application," but placed those ownership percentages on the form because the form "contained questions about . . . the percentage of votes and Mitchell assumed that numbers had to be placed there." *Id.*, at paras. 5, 6. Once the applications were designated for hearing, Mitchell retained counsel, reduced the partnership agreement to writing at the suggestion of counsel, and amended PHBC's application. *Id.*, para. 7. The written agreement newly added explicit insulatory provisions barring participation by the passive owners (Boyd and Landers) in the proposed station, so as to comply with Commission "passivity" requirements. *Id.*, para. 8. Because the insulation provisions were added after the period for filing amendments as of right, and recognizing that applicants may not improve their comparative positions after that date, *see generally Alexander S.*

Klein, 86 FCC 2d 423, 434 (1981), the ALJ constructively attributed the non-integrated passive owners' interests to the applicant and reduced PHBC's integration credit to the 60% listed in the application as of the B cut-off date. *I.D.*, para. 78.

5. Koyle contends that PHBC should be stripped of all of its integration credit because PHBC's "inchoate ownership structure as of the amendment as of right date" had "left [a] fundamental uncertainty about the true nature of its organizational structure," quoting *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990). Exceptions at 38. We are constrained to disagree. In the recent *Evergreen Broadcasting Company*, FCC 91-267, released September 20, 1990, the Commission, citing *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 (1988) and *Coast TV*, 4 FCC Rcd 1786, 1788 (1989), held that applicant organizational structures "did not require written documentation of organizational structure on the B cut-off date." *Evergreen* at para. 6. In *Victory*, the Commission had reversed the ALJ and the Board for their refusal to credit an alleged "oral" corporate structure. 3 FCC Rcd at 2074.[4] In *Evergreen*, the Commission did much the same with respect to partnerships, and it there reiterated that oral testimony and later-supplied declarations as to ownership structure could supplant (indeed, override, *see Victory)* documentation. The rule to be applied now to integration credit under those Commission opinions is that "the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Royce International*, 5 FCC Rcd at 7063.

6. Here, PHBC experienced two changes in its organizational structure from the time it originally filed. First, according to PHBC, Landers withdrew as a "limited" partner (after the B cut-off date), and her 20% was redistributed proportionally to Mitchell and Boyd. But since the loss of any "passive investor" does not affect the comparative analysis, this change is legally irrelevant under *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). Second, PHBC sought a *post* B cut-off amendment to document its limited partnership agreement (Mitchell, "general" partner with 75% equity share; Boyd, "limited" partner with 25% equity share). *I.D.*, para. 9. The ALJ accepted the amendment for reporting purposes only under 47 CFR § 1.65, but refused to recognize the agreement insofar as it included the written insulation provisions required under *Attribution of Ownership*, 58 RR 2d 604, 619-20 (1985)(*on reconsideration),* to separate "limited" from "general" partners. *I.D.*, para. 78. The ALJ there reasoned that recognition of the insulation provisions would permit PHBC to upgrade impermissibly after the B cut-off date, a principle discussed at length in *Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 214-217 (Rev. Bd. 1984)(subsequent history omitted). Because PHBC itself does not except to the constructive inclusion of the pre-B cut-off Boyd and Landers equity shares (40% aggregate PHBC equity) in its "active" equity calculations, or to the consequent quotient of only a 60% integration factor for Mitchell, we need not determine whether *Evergreen* (or certain cases cited therein) *would* have permitted PHBC to amend to include its newly written insulation provisions in its proposal, or whether such a *post* -B cut-off amendment would have constituted impermissible upgrading. (We believe, however, that *Doylan Forney*, 5 FCC Rcd 5423, 5425 (1990), *aff'd per judgment sub nom. Maricopa Media, Inc. v. FCC*, No. 90-1456 (D.C. Cir. October 7, 1991), appears rather close on point, and that the insulative provisions would not be recognized for comparative integration purposes. *See also Evergreen* at n.11.)

7. At the same time, we reject the exceptions of Koyle (which applicant the ALJ found to project a wholly "sham" two-tiered ownership structure, *see infra* paras. 17-21), that *all* integration credit be denied to PHBC under *Royce International* as a mere "paper" proposal. In *Royce*, the Commission affirmed the Board's conclusion that an applicant was a "sham" limited partnership and it annunciated that *all* integration credit would be denied:

> where the applicant has failed to demonstrate reliably that nominally controlling principals will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure, [and] we have no basis for awarding any integration credit at all. The ownership and control of the applicant may be shown to be fatally uncertain because: (1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs; (2) a person with no disclosed ownership interest (again rather than the supposedly active owner) is in a position to exercise significant control over the applicant; or (3) the assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so. Such situations provide no basis for awarding even partial credit because the control of the applicant as between integrated and nonintegrated principals cannot be reliably ascertained, and, thus, we will discount such proposals completely.

5 FCC Rcd at 7064 (footnote omitted). Although, as we have indicated, not even PHBC argues to the Board to exclude the pre-B cut-off (40%) equity shares of its original "limited" partner(s), so as to raise its integration credit from 60% to 100%, the record here clearly places PHBC beyond the scope of *Royce*. Additionally, whereas, prior to *Victory* and *Evergreen*, the Board would have been reluctant to credit any undocumented ownership structures (save a sole proprietorship, of course), it has since been informed by the Commission in those cases to allay its misgivings. As the record evidence here does not persuade that PHBC has basically misrepresented the two-tiered nature of its organization, we will not discredit its entire integration proposal, but will affirm the ALJ's resolution as consistent with Commission precedent. *See Marlin Broadcasting of Central Florida Inc.*, 4 FCC Rcd 7945, 7948-7949 (Rev. Bd. 1989) (pre-B cut-off equity shares credited for integration purposes; demands to reject *all* credit rejected), *review denied*, 5 FCC Rcd 5751 (1990).

8. *Financial Qualifications.* Multicom and Koyle except to the *Memorandum Opinion and Order*, FCC 90M-885, released April 23, 1990, where the ALJ denied Multicom's motion to enlarge issues requesting the addition of financial qualifications and financial certification issues against PHBC. PHBC had represented that its financial certification was based on pre-filing conversations between Mitchell and Boyd, in which Boyd, a banker, assured Mitchell that his Pleasant Hope Bank would provide the applicant the necessary funding for its construction and initial operation. Boyd is the President,

Chairman of the Board, 40% stockholder, and Chief Loan Officer of the Pleasant Hope Bank. However, adverting to Mitchell's testimony (*see* Tr. 85, 97),[5] Multicom argued in its motion before the ALJ that PHBC lacked reasonable assurance of such funding because Mitchell had not discussed the costs of constructing and operating the station with Boyd.[6] It further argued that, even if Boyd had verbally assured Mitchell that financing from the Pleasant Hope Bank was available, such assurances were not sufficient without Mitchell also independently ascertaining from the bank that the funds were available.

9. PHBC responded with declarations by Mitchell and Boyd, both averring that they had, in fact, engaged in specific discussions on several occasions prior to the filing of the application as to the total costs of constructing and operating the station. PHBC Opposition, filed February 21, 1990, Exhs. 1, 2. With respect to his hearing testimony, Mitchell contended that Multicom had misinterpreted that testimony; *viz.*, that his remarks were "intended to reflect – in response to the question asked – that [he] did not specifically recall breaking down [his] overall estimate of costs into component parts in [his] discussion with Boyd." *Id.*, at Exh. 1 at p. 4. As support for this claim, PHBC attached a copy of Mitchell's deposition, taken less than two months earlier, which reflected that he had discussed the total costs with Boyd at the outset. *Id.*, Exh. 1, Attachment II. PHBC also appended (Exh. 1, Attachment I) a copy of a loan commitment letter from the Pleasant Hope Bank, dated February 14, 1990, to demonstrate that PHBC continues to have reasonable assurance of sufficient funding to construct and operate the proposed station.

10. In denying Multicom's motion, the ALJ observed:

> To Multicom, the "only conclusion that can be derived from [Mitchell's hearing] statements is that [Mitchell] did not provide Mr. Boyd with a specific cost estimate." In the view of the presiding officer, Mitchell's response reflected his focus on the component parts that made up the total estimated cost. The testimony had to do with whether Mitchell had provided Boyd with an *itemization* of the estimated expenses, and thus is consistent with Mitchell's declaration. The conclusion is that prior to the filing of Pleasant Hope Broadcasting's application, Boyd assured Mitchell that the Pleasant Hope Bank would be willing to lend the applicant sufficient funds to cover the estimated costs of construction and initial three-month operation.

MO&O, FCC 90M-855, at para. 4. The ALJ went on (*id.*, at para. 5):

> Multicom claims that Boyd's verbal assurances that the money would be available was not enough: "The applicant must make some effort to ascertain independently the reasonable assurance of funds before making the certification . . . [and] cannot rely on the cursory verbal assurances of another principal." None of that describes this case. Mitchell, Pleasant Hope Broadcasting's certifying principal, had serious loan discussions with Boyd, the bank's President, Board Chairman, 40% stockholder and its Chief Loan Officer. Boyd assured Mitchell that the necessary funds would be available through that bank should Pleasant Hope Broadcasting be granted the construction permit. Having thus been informed by the highest authority in the bank that financing would be available, Mitchell was not required to seek confirmation of that availability simply because Boyd is also a principal in the applicant. The Motion to Enlarge Issues will be denied.

11. Multicom, joined by Koyle, reiterates its claim that Mitchell and Boyd never discussed construction and operating costs of the proposed facility, and they argue that it was error for the ALJ to rely on the uncorroborated "post-hoc" Mitchell and Boyd declarations to find to the contrary. They also repeat an earlier claim that Boyd's oral assurances of bank financing were not sufficient to establish reasonable assurance, citing *RKO General Inc.*, 4 FCC Rcd 4679 (Rev. Bd. 1989), *aff'd in pertinent part*, 5 FCC Rcd 3222 (1990), and *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd at 7947. Koyle adds that, even if Boyd discussed a possible loan to PHBC with the bank's Board of Directors as PHBC claims, the record does not show that approval was given.

12. We will not second-guess the ALJ's credibility determination that Mitchell timely conveyed the total cost estimates to Boyd in seeking bank funding to meet anticipated costs. The ALJ was afforded the opportunity to scrutinize Mitchell and Boyd as witnesses at hearing, and he observed Mitchell's challenged testimony. *Cf. RKO General Inc.*, 4 FCC Rcd at 4689 (credibility findings of an ALJ are given decisional deference unless those findings are in irreconcilable conflict with the record evidence).[7] Moreover, the consistency between Mitchell's deposition testimony prior to hearing, and the *post*-hearing declarations of Mitchell and Boyd, support the ALJ's determination. Boyd explained in his declaration that he did not ask for a line-by-line itemization of estimated expenses, because he relied upon Mitchell's expertise in the broadcast industry and on his own familiarity with the industry based on prior broadcast station investments. *See* PHBC Opposition, *supra*, Exh. 2, p. 2.[8] We must hold that it was not error for the ALJ to consider the *post*-hearing declarations of Mitchell and Boyd, clarifying Mitchell's hearing testimony and corroborating their discussions as to the costs of constructing and operating the station. Although the Board previously had long-held that documentation of finances was required prior to application filing, *see, e.g., Las Americas Communications*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986), and PHBC concedes that it had no documentation of its bank financing when it first filed, *see* PHBC Reply at 2, the Commission has since interpreted its policy to imply that no documentation of finances was necessary under the (prior) FCC application Form 301. *See Northampton Media Associates v. FCC*, *supra* note 6. In *Northampton*, the Commission held that the unrebutted testimony of applicant principals was "substantial reliable evidence," establishing, at least there, the existence of an oral agreement to fund an application. 4 FCC Rcd at 5519. Thus, PHBC's declarations, uncontroverted in critical respects, were admissible as evidence of reasonable assurance of financing.

13. Finally, the exceptors' reliance on *RKO General Inc.* and *Marlin Broadcasting of Central Florida, Inc.* for the proposition that Boyd's verbal assurances were not sufficient to serve as a predicate upon which PHBC could base its financial certification is misplaced. In *RKO*, the

applicant based her alleged reasonable assurance of bank financing purely upon on a dinner conversation with a remote banker, who in turn simply indicated that banks are willing to work with people who have profitable radio stations in a good market. 4 FCC Rcd at 4685-4687. No specific loan assurance was there indicated by the banker. *Id.* And in *Marlin*, the financial certification was based solely on a casual phone conversation between a non-voting stockholder and a friend (who was a bank employee) discussing the possibility of a loan, but the bank there gave absolutely no loan assurance. 5 FCC Rcd at 5751. Here, Mitchell specifically requested and received assurances from Boyd, the bank's highest lending officer, who was both familiar with, and personally involved in, PHBC's broadcast proposal, that sufficient funds would be available. We have previously acknowledged that, although approval by a bank loan committee is generally a prerequisite to a *final* loan agreement, no such formal agreement is required at the FCC application stage. *See A. P. Walter, Jr.*, 6 FCC Rcd 875, 879 n. 6 (Rev. Bd. 1991). In sum, the ALJ correctly refused to add financial qualifications and financial certification issues against PHBC on the basis of the pleadings then before him. *See Priscilla L. Schwier*, 4 FCC Rcd 2659, 2660 (1989) (petitioner bears the burden of making a *prima facie* case for adding a financial issue against an opponent), *aff'd by judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. February 7, 1990).[9]

14. One final matter requires comment. At oral argument, Koyle raised for the first time a contention that PHBC's proposed loan would be a violative of Missouri banking law (Tr. of Oral Arg. 517-521).[10] This allegation, in turn, spawned a series of *post*-oral argument pleadings. We will formally reject both the argument and the pleadings responsive thereto. As to the *post*-oral argument pleadings, and under Section 1.277(c) of the rules, 47 CFR § 1.277(c), no pleadings other than exceptions and replies are anticipated, unless specifically invited by the Board or permitted under another rule section. And because we reject Koyle's oral argument interposition of the state banking law, nowhere raised before the ALJ or even in its exceptions to the Board, as no more than a belated attempt to "parry with an offer of more evidence." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941), the further pleadings are superfluous. *See also* 47 CFR § 1.277(a) (objection not saved by exception is waived); *Millar v. FCC*, 707 F.2d 1530, 1537-1538 (D.C. Cir. 1983)(objection not made to ALJ is untimely).[11]

15. But even if we ignored the procedural deficiencies, we would not necessarily respond to Koyle's 13th-hour claim. Koyle asserts that Section 362.170(5) of the Revised Statutes of Missouri prohibits, in essence, a salaried officer of any bank from using or borrowing money in excess of ten percent (10%) of the bank's unimpaired capital. It is not controverted that Boyd qualifies as a "salaried officer" of the Pleasant Hope Bank, or that the proposed loan exceeded 10% of the bank's unimpaired capital at the time PHBC filed its application. PHBC counters, however, that the loan would be prohibited *only* if Boyd were not a "passive" investor. PHBC Opposition, filed August 26, 1991, at 5 and Exh. 1 (Opinion Letter of Kerry D. Douglas, Esquire). Koyle rejoins that, at the time PHBC filed its application and certified as to its financial qualifications, Boyd was a *de facto* "general" partner, which fact it insists the ALJ tacitly acknowledged when he reduced PHBC's integration credit (to 60%) by constructively attributing Boyd's "passive" equity interest into the comparative "integration" calculus.

16. Koyle mixes apples and oranges: though we have affirmed the ALJ's refusal to recognize PHBC's *post* -B cut-off partnership insulation provisions for the Commission's comparative *integration* purposes, we do not go so far as to interpretively place Boyd in potential violation of the subject state banking requirement. Indeed, and in general, the Commission does not attempt to apply state law to its ownership/management integration analyses, since these local laws are entirely unrelated to the Commission's own comparative policies and purposes. *See, e.g., Cotton Broadcasting Co.*, 4 FCC Rcd 1781, 1782 (1989). While the Commission will recognize a bank's loan limitations in making *financial qualification* determinations, *see California Broadcasting Corp.*, 2 FCC Rcd 4175, 4196 n.22 (Rev. Bd. 1987), *review denied*, 6 FCC Rcd 283 (1991); *see also CBS, Inc.*, 49 FCC 2d 1214, 1226-1230 (Rev. Bd. 1974); *Cherokee Broadcasting Co.*, 8 FCC 2d 138 (Rev. Bd. 1967), Koyle's legal argument as to the applicability of the subject state banking limitation seems plainly to presuppose that Boyd was, and is, a PHBC "general" partner, solely because no written limited partnership agreement existed prior to the B cut-off date. *See* Koyle Reply To Supplement, filed August 15, 1991, at 5 & n.3. We ourselves do not presuppose that to be the case, certainly not for *comparative* evaluation purposes, *see Evergreen, supra* (oral partnerships recognized for FCC comparative purposes); and, as we opined above, we will not at this late stage wade into the thicket of state banking laws. *Compare California Broadcasting* and *CBS, Inc.*, where the applicability of state banking law was raised in a timely fashion.

KOYLE BROADCASTING CORP.

17. Unlike PHBC, where "general" partner Mitchell, a man with extensive broadcast experience, organized and dominated the affairs of his entity and sought only passive investors, *see I.D.*, paras. 4-5, 14, Koyle presents the obverse in a manner that marks it indelibly as the prototypical sham of the breed routed in such recent cases as *Evansville Skywave, Inc.*, 6 FCC Rcd 5373 (Rev. Bd. 1991). *See also Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990), *aff'd per judgment sub nom. Southeast Florida Broadcasting Limited Partnership v. FCC*, No. 90-1482 (D.C. Cir. October 28, 1991).

18. The record reflects that Koyle's putatively passive ("non-voting") principal, Douglas R. Whitman, who holds a full 80% of Koyle's equity, is the prime mover and dominant principal of Koyle. Whitman, a veteran broadcaster who had a concurrent application on file for new FM frequency in Lowell, Arkansas, and did not wish an attributable media diversification handicap in this proceeding, recruited Karleen Koyle, who has no broadcast experience whatever, to be his entity's sole "voting" shareholder just before the application was filed. Koyle's own exceptions tell much of the tale not already set out in the *I.D.* Whitman visited Pleasant Hope with the idea of filing for the instant FM frequency. He there met Koyle through a religious group, and (1) quickly offered her a 20% equity share and, allegedly, *total* control over his Pleasant Hope corporation; (2) offered to pay all application prosecution expenses in addition to offering

her non-recourse loans, but he did not ask her for her financial statements or check her credit (she'd "had some unspecified financial problems in the past"); and (3) referred her to communications counsel, with whom Whitman consulted extensively even *after* the application was filed. Further, (4) "[t]he idea of filing as a corporation was not Koyle's" and "Whitman testified that he did not know who suggested voting and non-voting stock." (*I.D.*, para. 31); and (5) the *I.D.* found (at paras. 36-37):

> Mr. Whitman made the initial contact with First Financial Federal Savings in Eldora, Arkansas, the financial institution which Koyle relies on for its financial certification. Tr. 303. Specifically, Mr. Whitman contacted Mr. Bullard, the financial officer at First Financial. Tr. 304. Mr. Whitman had a previous banking relationship with First Financial and had known Mr. Bullard for perhaps a year or two. Tr. 304, 307. Mr. Whitman suggested to Ms. Koyle that she contact Mr. Bullard. Tr. 306, 153. Mr. Whitman told Mr. Bullard to expect a telephone call from Ms. Koyle Tr. 307. Ms. Koyle testified that she had never previously done business with First Financial and relied on Mr. Whitman for his financial backing. Tr. 153.
>
> Ms. Koyle contacted Mr. Bullard by telephone, but she never actually met him in person. Tr. 152-53. The only document Ms. Koyle recalled forwarding to Mr. Bullard was a draft letter prepared by [Koyle counsel] Mr. Corbett. Tr. 183. Ms. Koyle testified that she did not recall providing Mr. Bullard with any budget figures. Tr. 184. Mr. Whitman testified that Mr. Bullard was provided with Mr. Whitman's financial statement in connection with the Pleasant Hope application. Tr. 305-306. Mr. Whitman further testified that no other documents were provided to Mr. Bullard. Tr. 305-306. Mr. Whitman does not recall discussing with Mr. Bullard what would be necessary in order to obtain financing or reasonable assurance of financing for the proposed station. Tr. 307. After Mr. Whitman's initial contact with Mr. Bullard regarding Koyle's application, Mr. Whitman has engaged in subsequent discussions with Mr. Bullard with respect to Koyle's application. Tr. 344-45.

19. Moreover, the ALJ found that (*id.*, at para. 40; emphasis added):

> Koyle Broadcasting Co.'s Articles of Incorporation were amended on February 26, 1988. Tr. 161; Williams' Ex. 8. The Amended Articles of Incorporation provided Mr. Whitman with *the power to veto any withdrawal, merger, or dismissal of Koyle's application*. Tr. 162; Williams' Exh. 8. Mr. Corbett initiated the amendment to Koyle's Articles of Incorporation. Tr. 162-64.

In sum, the ALJ determined (*id.*, at para. 88):

> The record reflects little significant activity by Ms. Koyle in connection with the application. Whitman's hand, however, is visible throughout process. He sought out someone to act as a front person while he theoretically remained in the background. He is now asking the Commission to believe that he decided to turn over a substantial investment to the control of someone who was almost a complete stranger, who had no broadcast experience, and who had suffered recent financial problems. Furthermore, it was Whitman who chose the source of financing for the construction and operation of the proposed station, and it was he who chose the communications counsel who would prosecute the application. Finally, Whitman is the only party with any substantial financial stake in the applicant. Whitman is the party actually in control to protect his sizable investment. Ms. Koyle is not likely to exercise any real authority over the applicant. Koyle Broadcasting is awarded 20 percent quantitative integration credit for Ms. Koyle proposed participation.

20. Citing *Victory Media* and *Coast TV*, *supra*, Koyle contends that the facts relied upon by the ALJ are legally insignificant in that neither Ms. Koyle's utter lack of broadcast experience, nor her token financial contribution ($2000), nor Whitman's pre-organizational role is dispositive of the *bona fides* of Koyle's ownership structure. We do agree with Koyle that the test -- the same as it is for *all* issues -- is the "totality of record evidence." *See* 5 U.S.C. § 556(d) (adjudications to be decided on the "whole record"). In testing the reliability of a two-tiered organizational structure, the Commission recently gave very clear and precise guidance on the true meaning of its recent cases. Thus, in *Evergreen Broadcasting*, *supra*, it rejected the arguments of an applicant, EVI, that similar activities were legally insignificant and it observed (*id.*, at para. 14):

> Citing *Victoria Media, Inc.* and *Royce*, EVI argues that pre-formation activities are not a basis for discrediting an applicant's ownership structure. But in *Royce* at n. 13, we noted that "i[n] *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission reaffirmed the principle set forth in *KIST Corp.*, 102 FCC 2d 288 (1985) that it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is *bona fide*. *Id.* at 2753 n.4." In this respect, *Coast TV* expressly overruled *Victory* and reiterated the relevance of such activities under *KIST*. Thus, to the extent that EVI cites *Victory* for the proposition that pre-formation activities are not probative of who will control the ongoing business, *Coast TV* makes clear that pre-formation involvement by purportedly passive principals remains a pertinent consideration in evaluating the reliability of an applicant's ownership structure. Indeed, citing *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶¶ 14-21 (1990), we explained in *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2499 n.5 (1991), that "the pre-formation record [may] raise[] questions that, standing alone, could . . . justif[y] rejecting the applicant's proposal."

21. As even the Supreme Court has noted, the Commission has been beset by sham two-tier applicants seeking to artificially skew the FCC's comparative analyses by deploying individuals as "fronts" for ambitious entrepreneurs who do not themselves present those personal characteristics most favored by the agency. *Metro Broad-*

casting, Inc. v. FCC, 110 S. Ct. 2997, 3025 n. 48 (1990). *See also Royce International, supra*. A perfect example of such a "sham" was found in *Metroplex Communications*, where the nominally "passive" element also purportedly ceded *exclusive* control over the applicant entity to a virtual stranger. The Commission there stated:

> It is not credible that a group of experienced investors (including those with past broadcast ownership) would grant exclusive control of their station to a virtual stranger with no broadcast experience, who would make no investment in the station. On the facts before us, we fail to see any legitimate *quid pro quo* by [the stranger] for becoming general partner. We have in the past rejected such instances of "giving away the store" as unworthy of credence. *See KIST Corp.*, 102 FCC 2d 288, 292 (1985).

5 FCC Rcd at 5612.[12] Under very similar facts in *Evansville Skywave*, we recently held:

> If the *Metroplex* Commission regarded the 4% equity interest and alleged exclusive control ceded to [the stranger] to there be "giving away the store," then this seems plainly an *a fortiori* case. Skywave is likewise a sham.

6 FCC Rcd at 5375. The same is true here. A comparison between the facts undergirding PHBC's two-tiered structure with the facts surrounding Koyle makes vivid the application of the Commission's *Evergreen* principles in treating with two-tiered integration proposals. Because we find Koyle's entire structure be a "sham," we do not affirm the 20% ownership integration credit awarded by the ALJ. *Royce International, supra*.[13] Furthermore, because we find that Whitman has not been, nor would he likely be, a "passive" principal, the ALJ was correct in attributing his other broadcast interest for comparative media diversification purposes. *See Daytona Broadcasting Co., Inc, supra*.

22. *Comparative Summation*. PHBC has been awarded 60% quantitative integration compared to 0% for both of its competitors, making it the comparatively superior applicant under the ownership integration criterion. Additionally, both Multicom and Koyle have been accorded diversification demerits. We, therefore, affirm the ALJ's award to PHBC.

23. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike or, in the Alternative, Further Reply to Reply Brief of Koyle Broadcasting Corporation, filed May 21, 1991, by Pleasant Hope Broadcasting Co., L.P. IS DENIED; that its Motion to Accept Supplement and Supplement to Reply Exceptions filed August 6, 1991 IS DISMISSED; and that the Motion to Correct Transcript of Oral Argument filed August 15, 1991 by Koyle Broadcasting Corporation IS GRANTED; and,

24. IT IS FURTHER ORDERED, That the application of Pleasant Hope Broadcasting Co., L.P. (File No. BPH-871209MB) for a Construction Permit for a new FM station at Pleasant Hope, Missouri, IS GRANTED; that the applications of Koyle Broadcasting Corporation (File No. BPH-871210MD) and Multicom Broadcasting, Inc. (File No. BPH-871210MF) ARE DENIED; and, that the application of Minorities Broadcasting Company of Missouri, Inc. (File No. BPH-871210ME) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] A fourth applicant, Minorities Broadcasting Company of Missouri, Inc., did not file exceptions to the denial of its application by the *I.D* Consequently, its application is hereby dismissed pursuant to 47 CFR § 1.276(f). *See, e.g., Breaux Bridge Broadcasters, Limited Partnership*, 4 FCC Rcd 4995 (Rev. Bd. 1989).

[2] Participation in station operations by owners ("integration") is desirable because it links legal responsibility and day-to-day performance. *Policy Statement*, 1 FCC 2d at 395.

[3] Landers has since resigned from PHBC, and her equity interests were divided between Mitchell and Boyd in accordance with their relative equity interests in the partnership. Mitchell now has an equity interest of 75% and Boyd 25%. *I.D.*, para. 9.

[4] Although the Commission has lately disavowed certain improvident aspects of *Victory, see Coast TV*, 5 FCC Rcd 2751, 2752 (1990) and *Royce International, supra*, 5 FCC Rcd at 7065 n.13, it has not modified this particular aspect of that oft-cited case; in fact this aspect was just reaffirmed in *Evergreen*.

[5] The particular testimony was as follows:

> COUNSEL: Did you -- in making the arrangements through Pleasant Hope Bank for reasonable assurance for financing, did you discuss with Mr. Boyd what it would cost to construct the station?
>
> MITCHELL: I don't think I got down into real figures. We had just discussed on probably what it would run to get the -- up to the time we got a CP, and after that, it was a matter is -- that the station would get the financing after that for it.

Tr. 85.

> MITCHELL: Oh, I'm sorry, sir. I do not remember specifically telling Noel the estimated cost of operating the station, of constructing it as far as breaking it down into the cost or anything like that there. I may well have said that perhaps we'll need this amount. I can't specifically remember talking about the constructing and operating the station.

Tr. 97.

[6] The Commission requires an applicant to certify in its application that it has "reasonable assurance" of sufficient net liquid assets on hand, or sufficient funds available from committed sources, to construct and operate the requested facilities for three months without revenues before it will find that the applicant is financially qualified. FCC Form 301, Section III, Item 2(a); *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1893 (1991). To satisfy the Commission's standard of reasonable assurance, "the applicant must adduce probative evidence that it has engaged in serious and reasonable efforts to ascertain predictable construction and operation costs" and "provide substantial and reliable evidence showing 'sufficient net liquid assets . . . ' to construct and

operate the station . . . ." *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-55 (1989), *aff'd*, No. 90-1291 (D.C. Cir. July 12, 1991).

[7] There is some indication that Boyd briefly entertained with the idea that PHBC should obtain financing from a competing bank, Boatman's Bank of Springfield. *See* Multicom Reply to Opposition to Motion to Enlarge, filed May 6, 1990, at Attachment 2 (Boyd's Deposition taken November 13, 1989, pp. 14-15.) Boyd clarified his remarks, stating that the money would be available from the Pleasant Hope Bank, but that it would be his preference to get it at Boatman's "simply because a bank examiner might see it as an insider transaction." *Id.*, at p. 16. At hearing, Boyd alluded to his earlier deposition, explaining that his life would be simpler if the loan came from another bank because of the documentation necessary to accompany a Pleasant Hope Bank loan, but that it would be no significant problem. Tr. 34. He recognized that it was Mitchell's decision which bank to use. Tr. 35. We do not find Boyd's remarks persuasive, one way or the other, as to the *bona fides* of Mitchell's financial certification.

[8] Boyd was previously an investor in broadcast stations located in Missouri and Colorado. Williams Exh. 3, p. 2. Mitchell averred in his declaration that he has an extensive background in broadcast engineering, currently serving as a contract engineer for several radio stations in the Pleasant Hope area, and that his estimate for the construction costs and station operation was based on his familiarity with the equipment required for construction of a station as well as on discussions with nearby station general managers at KAYQ (FM) and KBFL (FM), Warsaw and Buffalo, Missouri, respectively, and the station owner of KSWM (AM) and KFLE (FM) at Aurora, Missouri. Opposition, Exh. 1, pp. 1-2.

[9] Multicom also contends that further questions relating to PHBC's financial qualifications are raised by the applicant's failure to submit documentation to the bank showing its creditworthiness and by PHBC's failure to obtain (prior to filing) a bank loan commitment letter. These contentions are rejected. As aptly noted by PHBC, its application was still in the formative stages and had no creditworthiness when Mitchell obtained assurances of financing. The proper inquiry is to look at the principals' financial standing. Here, Boyd was familiar with the credit background of Mitchell, a 30-year friend and customer of the bank (Tr. 25, 82-83); his own financial posture; and the instant broadcast venture. That is sufficient under *Scioto Broadcasters*, 5 FCC Rcd at 5160. Moreover, under *Northampton*, 4 FCC Rcd at 5519, written documentation is not necessary to certify one's financial qualifications, providing the applicant had reasonable assurance at the time of certification. While the policy question of whether contemporaneous written documentation should be required is again before the Commission, *see Northampton Media Associates v. FCC*, No. 90-1291 (D.C. Cir. July 12, 1991) (admonishing the Commission for not explaining its policy departure from *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986)), that policy question is beyond the purview of the Board's authority. *See SBM Communications, Inc.*, 6 FCC Rcd 5021 (Rev. Bd. 1991) (Board has no policy-making authority). Boyd averred in his declaration that the 1990 loan commitment letter confirmed in writing his oral assurances previously made to Mitchell before certification. Opposition, Exh. 2, pp. 2-3.

[10] Counsel stated:

> And in preparation for oral argument I just thought it would be prudent to educate myself about Missouri banking law . . . .

Tr. of Oral Arg. 517-518.

[11] *Cf. Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991), where the Commission reversed the Board for remanding a proceeding on exceptions to a late-filed petition to enlarge issues. The Commission stated (*id*):

> Section 1.229(c) [governing motions to enlarge, change or delete issues] provides for consideration of a late-filed petition to modify issues only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. In *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 856, 875 ¶ 23 (1976), the Commission stated that this standard will be strictly construed and that motions for modification of the issues must be filed promptly after the facts are known or could reasonably have been known to the moving party. Finally in *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1965), the Court stated that "[o]rderliness, expedition and finality in the adjudicatory process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own."

[12] *See also Poughkeepsie Broadcasting, supra*, where in language equally applicable here the Commission stated:

> This case implicates concerns about the reliability of applicants' integration proposals that we have encountered several times since we addressed that issue in *KIST Corp.*, 102 FCC 2d 288 (1985). Since that time, we have steadily sought to clarify our policy with respect to these proposals to make our determinations as to their reliability more realistic. Recently, in *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), we issued a comprehensive statement concerning applicants with defective integration proposals. In some respects, we restated existing case law, but we also adopted certain refinements that were logical outgrowths of prior precedent. In particular, we held that the principle that requires applicants to establish the overall reliability of their integration proposals to obtain comparative credit necessarily applies to the subsidiary question that has recently generated much litigation -- namely, whether the applicant's described ownership structure accurately reflects the manner in which control will be exercised. Among other things, we stated that when an applicant fails to demonstrate that nominally active principals in a two-tiered entity (such as the general partners in a limited partnership) will be exercising control, the applicant should not receive any integration credit. *We noted that we would reach this conclusion when the evidence shows that an applicant was formed in a manner that is irreconcilable with the exercise or sound business judgment -- for example, when it appears that the individuals organizing the applicant are giving away control or ownership in a manner that is patently unreasonable on its face.* In these circumstances, it is unrealistic to conclude that an applicant's proposed grant of exclusive and integrated control to nominally active principals is reliable.[2]
>
> . . . .
>
> Because the applicant has the burden of establishing the validity of its proposal, we will not hesitate to reject a proposal where the applicant's showing is deficient. In this regard, we disavow language in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 ¶ 19 (1988), to the extent that it

could be read as suggesting that a reluctance to second guess an applicant's business judgment would preclude us from evaluating an applicant's claim that its structure is bona fide.

6 FCC Rcd at 2497-98 & n.2 (emphasis added).

[13] But for the fact that our affirmance of the ALJ's denial of integration credit to Koyle, a denial we extend to *all* integration credit, effectively denies this construction permit to Koyle, we would remand this case to the ALJ on the basic qualifying issues of truthfulness and/or abuse of process. *See Evansville Skywave*, 6 FCC Rcd at 5373-5374, 5377 n.12. For much the same reason, we need not overrule the ALJ's refusal to add a financial issue against Koyle, *see* Multicom Exceptions at 16-17. However, we agree with Multicom that substantial and material questions of fact surround Koyle's financial certification, that the testimony of Koyle's two principals on the matter of the bank loan seems turbid and contradictory (*compare* Tr. 183-84 (Koyle) *with* Tr. 305-310 (Whitman)), and that the bank loan letter appears to have been supplied on no legitimate basis. *See I.D.*, para. 36-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-135

In re Applications of

CARDWELL BROADCASTING — File No. BPH-880301NT

HAPPY VALLEY BROADCASTING, INC. — File No. BPH-880301OR

For Construction Permit for
New FM Station, Channel 230A,
Turners Falls, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1991; Released: November 13, 1991

By the Review Board:

1. Before the Review Board is the "Joint Petition for Approval of Settlement Agreement, Grant of the Application of Cardwell Broadcasting and Dismissal of the Application of Happy Valley Broadcasting, Inc.," filed by the captioned parties on October 15, 1991.

2. In an *Initial Decision*, 6 FCC Rcd 5109 (1991), Administrative Law Judge John M. Frysiak (ALJ) granted the application of Cardwell Broadcasting (Cardwell) and dismissed the application of Happy Valley Broadcasting, Inc. (Happy Valley) for failure to prosecute its application on a basic qualifying (misrepresentation/lack of candor) issue specified in the *Hearing Designation Order*, 5 FCC Rcd 1920, 1921 (1990) (HDO).

3. More precisely, the following issues were specified (in addition to the standard comparative issue) in the HDO:

> 1. If a final environmental impact statement is issued with respect to . . . Happy in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
>
> 2. To determine, in light of the evidence adduced . . . whether Happy . . . made misrepresentations to the Commission, [was] lacking in candor in [its] dealings with the Commission, or attempted to deceive or mislead the Commission.

4. These issues were added with respect to Happy Valley upon consideration of the following: Item 20, Section V-B of FCC Form 301 (October 1986), asks whether a grant of the proposed application would fall within the ambit of Section 1.1307 of the Commission's Rules such that it may have a significant environmental impact. Happy Valley, which planned to build a new tower, answered this item in the affirmative, and submitted an appropriate environmental assessment. In that environmental assessment, Happy Valley stated that its proposed site was *not* located at or near a registered historical landmark or monument. However, a number of informal objections were filed with respect to the Happy Valley proposal. Specifically, the Massachusetts Historical Commission and the Advisory Council on Historic Preservation filed informal objections, dated March 29, 1989 and April 5, 1989. Historic Deerfield, Inc., also filed informal objections against the Happy Valley application, dated April 3, 1989 and May 5, 1989. The informal objections questioned whether the Happy Valley tower proposal could affect "Old Deerfield Village," a designated Registered National Historic Landmark. The objections lodged against Happy Valley further charged that Happy Valley's representation to the Commission that its proposed site was not located at or near a registered historical landmark or monument was "an intentional fabrication and a deliberate attempt to mislead the Commission." *See* HDO; I.D., para. 3.

5. In the I.D. (at paras. 5-6), the ALJ noted the following:

> The Commission . . . also designated an additional issue against Happy Valley as a result of the claim made in the Happy Valley application that its proposed facilities are not located at or near a registered historical landmark or monument. Specifically, the Commission specified that evidence was to be adduced to determine whether Happy Valley made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission, or had attempted to deceive or mislead the Commission.
>
> By *Order*, released June 11, 1990, the presiding Administrative Law Judge established October 22, 1990 as the date for the filing of each applicant's direct case. On that date, Happy Valley submitted direct case exhibits dealing only with the standard comparative issue (Happy Valley Exhs. 1-6). Happy Valley offered no evidence at the hearing in response to the issue of misrepresentation/lack of candor/attempt to deceive or mislead.

As a result, the ALJ concluded with respect to the application of Happy Valley (I.D., para. 41):

> The record contains no evidence relevant to this designated issue [2]. Section 1.254 of the Commission's Rules provides that the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation. Because the HDO herein did not provide otherwise, the burden of proof and of proceeding was on Happy Valley. Happy Valley did not meet this burden. Consequently, the Happy Valley application must be dismissed for failure to prosecute on the basic qualifying issues designated against it.

6. We note that neither petitioner disclosed in their joint petition (or referenced in the proposed settlement agreement), the existence of this remaining unresolved basic qualifications issue specified against Happy Valley. Nevertheless, the settlement agreement as structured provides for no monetary consideration to be paid to either party; rather, Cardwell (1) will only be required to notify Happy Valley (for a period of three years following commencement of program tests) of any intention Cardwell has to sell the station; and (2) has granted Happy Valley a "right of first refusal" (for the same period of time) to purchase this broadcast facility, subject to Commission approval.

7. The joint petition and attached settlement agreement otherwise comport fully with (1) the Commission's *Amendment of Section 73. 3525. .. Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 (1990), *modified*, 6 FCC Rcd 2901 (1991); and (2) the provisions of 47 U.S.C. § 311(c) and 47 CFR § 73.3525(a) that govern settlement agreements. Attached to the joint petition is a copy of the universal settlement agreement between the parties, which contains declarations from the principals of the applicants setting forth the reasons why the agreement is in the public interest, and states that their applications were not filed for the purpose of carrying out the proposed settlement agreement. This resolution of the proceeding will serve the public interest by expediting the institution of new FM service in Turners Falls, Massachusetts.

8. However, while the settlement agreement will be approved, we note that Happy Valley will be required to fully disclose the matter of the outstanding basic qualifications issue specified against it in this proceeding if it, or any of its principals, files a subsequent application to become Commission licensees of the instant (or any other) broadcast facility.[1] *See Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373 (1980) ("If the dismissing applicant is not an existing Commission licensee, [outstanding] allegations can be revisited in a future proceeding should the applicant again seek to obtain a Commission license.")[2]

9. ACCORDINGLY, IT IS ORDERED, That the "Joint Petition for Approval of Settlement Agreement . . . ." filed on October 15, 1991 by the captioned parties IS GRANTED; the attached joint settlement agreement IS APPROVED; the application of Happy Valley Broadcasting, Inc. (File No. BPH-880301OR) IS DISMISSED with prejudice; the application of Cardwell Broadcasting (File No. BPH-880301NT) IS GRANTED; and, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] *See, e.g.*, FCC Form 301, Section II, Question 7(e); FCC Form 314, Section II, Question 7(d).

[2] On October 30, 1991, the Commission's Mass Media Bureau filed its "Comments" concerning the proposed settlement agreement. While it did not address the remaining unresolved basic qualifications issue specified against Happy Valley, the Bureau does support "grant of the relief requested." Comments, at para. 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Ruling by Press
Television Corporation Concerning
Applicability of Section 73.658(m)
of the Commission's Rules in the
Orlando-Daytona Beach-Melbourne-
Cocoa Television Market

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1991; Released: November 13, 1991

By the Commission:

1. By this *Memorandum Opinion and Order,* the Commission affirms its decision in *Memorandum Opinion and Order (MO&O),* 4 FCC Rcd 8799 (1989). The *MO&O* granted Press Television Corporation ("Press" or "WKCF"), licensee of WKCF-TV, Clermont, Florida, a waiver of Section 73.658(m) of the Commission's rules to allow it to compete with television stations in the Orlando-Daytona Beach-Melbourne-Cocoa market for exclusive rights to non-network television programs. A Petition for Reconsideration was filed by Meredith Corporation (Meredith), licensee of WOFL-TV, Orlando, Florida.[1]

2. Section 73.658(m) of the Commission's rules, generally, permits a television station to buy exclusive rights to non-network programming only against other television stations in the same market and against stations no more than 35 miles distant. The rule has as its intended purpose facilitating the acquisition of programming by stations in "overshadowed" markets.[2] The rule states, in relevant part:

> (1) No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away... from broadcasting any program purchased by the former station from such non-network program producer, distributor, or supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in Section 76.51 of this chapter, and for markets not listed in Section 76.51 of this chapter, the listing as contained in the ARB *Television Market Analysis* for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under the practices of the industry. * * *
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> NOTE 2: It is intended that the top 100 television markets listed in Section 76.51 of this chapter shall be used for the purposes of this rule and that the listing of the top 100 television markets appearing in the ARB *Television Market Analysis* shall not be used. The reference in this rule to the listing of markets in the ARB *Television Market Analysis* refers to hyphenated markets below the top 100 television markets contained in the ARB *Television Market Analysis.* If a community is listed in a hyphenated market in Section 76.51 and is also listed in one of the markets in the ARB listing, the listing in Section 76.51 shall govern.
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> * * * * *
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> NOTE 4: New stations authorized in any community of a hyphenated market listed in Section 76.51 of this chapter or in any community of a hyphenated market listed in the ARB *Television Market Analysis* (for markets below the top 100 markets) are subject to the same rules as previously existing stations therein. New stations authorized in other communities are considered stations in separate markets unless and until Section 76.51 is amended by the Commission, or the ARB listing is changed.

3. This proceeding began when Press requested a declaratory ruling that WKCF is a station in the Orlando-Daytona Beach-Melbourne-Cocoa market and, therefore, may obtain exclusive rights to non-network television programming vis-a-vis other stations in that market under Section 73.658(m) of the rules. Although Clermont is 25 miles west of a named community (Orlando), it is not itself listed in Section 76.51 as a named community in the pertinent market. Thus, while Orlando stations could purchase program exclusivity vis-a-vis WKCF and all other stations in the market, WKCF could purchase program exclusivity only vis-a-vis the Orlando stations, but not vis-a-vis the other stations in the market.

4. Because Clermont is not a named community under Section 76.51, the Commission declined to declare Clermont part of the Orlando-Daytona Beach-Melbourne-Cocoa market. It noted, however, that WKCF's transmitter is 30 miles east of Orlando and shares a common tower with WESH-TV, Daytona Beach (a named community in this market). Given the location of Clermont and WKCF's transmitter within the Orlando-Daytona Beach-Melbourne-Cocoa market, we stated there was little doubt that WKCF was unavoidably competitive with other stations in the market and it would thus be anomalous to treat it as other than a market station for purposes of Section 73.658(m).[3] Thus, while Press' request for a declaratory ruling that WKCF is in the market designated by Section 76.51 of the rules was denied, we granted Press a waiver of the rule.

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[1] Press and Southern Broadcast Corporation of Sarasota (Southern) filed oppositions; H & C Communications, Inc. (H&C) filed comments. Meredith filed a Reply to Opposition to Petition for Reconsideration.

[2] *See Ralph C. Wilson Industries, Inc,* 91 FCC 2d 127 (1982).

[3] Subsequent to its decision to grant Press the waiver, the

Petition For Reconsideration

5. Meredith's petition challenges our action on several grounds. Meredith argues that we may not grant a waiver because Press did not request one. Meredith objects that we allowed only seven days for comment on Press' request and that commenters had no notice that granting a rule waiver was a possibility. Meredith also states that we have consistently acted in similar situations through rule makings to amend the list of markets in Section 76.51 of our rules and have failed to explain why prior procedures were inapplicable to Press' situation. Meredith notes that five other similarly situated requests for waiver have been subsumed in General Docket No. 87-24,[4] and Meredith contends that we failed to articulate what is inherently different about Press' situation to warrant special action. Meredith also states that the decision will cause more problems than it will resolve.

Oppositions to the Petition for Reconsideration

6. Press, in opposition, argues that the petition for reconsideration is without merit since it does not challenge the facts that led us to conclude that a waiver was appropriate for this case. Press states that the cases cited by Meredith do not support its arguments that improper administrative procedures were followed in this proceeding. Press also contends that waiting for a decision in General Docket No. 87-24 or a separate rule making to re-hyphenate the market would have resulted in the demise of WKCF. Press further states that the waiver was consistent with our actions in the numerous rulings cited by Meredith. Southern opposes the petition for reconsideration, noting that Press' waiver "is evidence of a laudable compassion for a broadcaster in serious need of regulatory assistance." H&C supports the *MO&O* insofar as it recognizes that any rights granted to WKCF will be reciprocal vis-a-vis all other market stations.

Discussion

7. We do not find the arguments presented in Meredith's petition for reconsideration persuasive. Meredith argues, first, that we cannot grant a waiver here because that is not what Press requested. It also claims that we did not adequately inform interested parties in the Public Notice that we contemplated a grant of a waiver to Press, and thus denied interested parties adequate opportunity to comment. We disagree. Section 1.3 of our rules specifically states that we may, on our own motion, waive any provision of the rules for good cause shown, in whole or in part. (47 C.F.R. § 1.3) Our public notice informed the public of Press' request for a declaratory ruling and provided seven days for comment. We are under no obligation to list any of the other possible dispositions of such requests, including certain actions not specifically sought, such as the waiver granted here. As Press points out, government agencies have the inherent power to apply rules flexibly and with waivers as needed to carry out their objectives. *National Broadcasting Co. v. United States,* 319 U.S. 190, 207 (1943); *United States v. Storer Broadcasting Co.,* 351 U.S. 192, 204-205 (1956). In this case, Press requested relief by means of a rule interpretation; we granted relief effectively equivalent to that sought through a rule waiver. The analysis and resolution relied on the same facts and arguments, and the parties did fully participate. The relief granted was, if anything, less broad than that sought.

8. Meredith claims that seven days for comments concerning Press' request for declaratory ruling was insufficient. However, all interested parties filed timely and thorough comments addressing issues of both procedure and substance and no party filed a request for an extension of time. Thus, we cannot find that the length of the comment cycle harmed Meredith or any other party. Further, the three cases Meredith cites in support of its position are not on point. We agree with Press that these cases deal with a party's failure to provide *any* notice, not with the alleged inadequacy of the notice admittedly given. *Armstrong v. Manzo,* 380 U.S. 545 (1965), involved a party to adoption proceedings who had no notice of that proceeding until after the proceeding was over; and *Grannis v. Ordean,* 234 U.S. 385 (1914), involved the validity of a notice when a party's name was misspelled in the newspaper legal ad and in the subsequent mailing of a copy to the party. *NOW, Washington, D.C. Chapter v. Social Security Administration,* 736 F.2d 729, 739 (D.C. Cir. 1984), involved Department of Labor procedures dealing with Freedom of Information Act requests to look at affirmative action data supplied by government contractors under a claim of confidentiality. There was a ten-day period to process the FOIA request and, after the FOIA determination was made, a ten-day period in which to review an appeal from that determination filed by the requesting party. The adequacy of these periods of time for the government to act was not challenged. Rather, the issue in that case was the government's failure to give the government contractor any notice of its disposition of the request, including review of the requesting party's appeal, until after the review period had expired. The Court held that this violated Department of Labor procedural rules.[5]

Commission approved an intraband television channel exchange to Press in which WKCF will operate on Channel 18, moving to the Bithlo antenna farm, where its antenna will be virtually co-located with the transmitting facilities of Orlando stations WFTV, WCPX and WOFL. *See Report and Order* in MM Docket No. 89-68, 4 FCC Rcd 8320 (1989); *recon. denied,* 5 FCC Rcd 6566 (1989); *appeal pending, Rainbow Broadcasting Co. v. FCC,* No. 90-1591 (D.C. Cir. filed December 10, 1990).

[4] The Commission adopted a *Report and Order* in General Docket No. 87-24 that reinstituted cable syndicated exclusivity rules and modified the existing network non-duplication and non-network territorial exclusivity rules. 3 FCC Rcd 5299 (1988). However, the Commission found that commenting parties had focused only limited attention on the territorial exclusivity rule and therefore concluded that it was desirable to seek additional comment before acting on any additional changes to this rule. The Commission subsequently adopted a *Further Notice of Proposed Rule Making (FNPRM)* in General Docket No. 87-24, 3 FCC Rcd 6171 (1988) regarding the non-network territorial exclusivity issue and withheld disposition of five requests for waiver of Section 73.658(m) filed prior to Press' request pending the outcome of that proceeding, which is still pending. *Id* at n. 9.

[5] Meredith further points to *VHF Drop-In Proceeding,* 90 FCC 2d 160,167 (1982) (*VHF*) as an example of a proceeding in which waivers were decided based on a thoroughly developed record with a "lengthy history," as opposed to the 75 days it took for the entire disposition of Press' request. The *VHF* proceeding was an examination of the entire TV Table of Assignments. It resulted in several rounds of comments over a long period of

9. Meredith further contends that we acted inconsistently compared to previous decisions when we granted Press the waiver. The *MO&O* explains, however, that the decision to grant the waiver was in accord with previous rulings. Contrary to Meredith's assertions, we specifically considered the Commission's analysis in *Robert R. Thomas, Jr.*, 53 FCC 2d 394 (1975). In that case, we refused to grant a waiver that would allow one station to prevent another station from enforcing its exclusivity rights under the rule because both stations, we determined, were considered to be part of the same market. There, as in this case, we found that exclusivity was appropriate because the relevant stations competed in the same market. We also do not believe that our decision in this case is inconsistent with *Territorial Exclusivity in Non-Network Arrangements (Tampa-St. Petersburg)*, 59 FCC 2d 1058 (1976). In that case, there apparently was no showing that the station truly competed in the market or that, without relief, actual injury would occur. Accordingly, we declined to make the broad interpretation of Section 76.51 urged upon us by the petitioner. In the present context, however, because we found that the facts unambiguously support the conclusion that WKCF does compete in the relevant market (which no parties deny), a waiver was granted for the same reason we denied waivers in the above-cited cases -- the decision was the appropriate action for each case, consistent with the underlying purpose of the rule.[6]

10. Meredith cites *Carthage Cablevision, Inc.*, 49 FCC 2d 1116 (1974) (*Carthage*), to support its position that rulemaking, not issuance of a rule waiver, is the proper procedure for reclassification of markets. In *Carthage*, a television station objected to a cable system's proposed carriage of a broadcast signal and requested the Commission to reclassify a smaller market television station as a major market television station to prevent such cable carriage. In declining this request, we stated our intent not to revise "[t]he Section 76.51... each time new rankings are issued." *Id.* at 1116-17. Of equal importance, we held that the licensee had "presented insufficient facts to warrant departure from our usual procedures and reclassification of the [] smaller market in a certification proceeding." *Id.* at 1117. Thus, *Carthage* is inapposite not only because it involved the Commission's former signal carriage rules, not the territorial exclusivity rule, but also because, unlike Press, petitioner did not present sufficient facts to warrant relief. *MO&O* at 8801.

11. Meredith further maintains that we failed to articulate adequately our explanation for granting Press a waiver.[7] We agree with Press, however, that in the *MO&O*, we explicitly recognized our departure from the usual practice of engaging in rule making. We fully explained the unique nature of WKCF's situation which warranted this departure from our general intention not to determine the applicability of the territorial exclusivity rule on a "caseby-case" basis. *MO&O* at 8801. Meredith has not challenged the specific facts, or stated its specific disagreement with the rationale by which we found this case to be unique.

12. Meredith claims that because we have decided to delay action on five other petitions while we consider rewriting the applicable rule, we are treating similarly situated parties dissimilarly, citing *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965) (*Melody Music)* and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (*Garrett)*. *Melody Music* requires that when the Commission does treat similarly situated parties differently, it should at least explain its different treatment of the two cases and explain the relevance to purposes of the Act. In *Garrett v. FCC*, the Court remanded the case, stating that the Review Board failed to reconcile the Commission's disposition of waiver requests for nighttime service by two daytime only AM radio stations operating on the same frequency and located 220 miles apart. Thus, the two waiver requests were interrelated due to the proximity of the stations; a grant of one waiver would have affected the other. That was not the case here. In the *MO&O*, we applied reasoned decision-making in our decision to grant the waiver to Press because the facts submitted show unambiguously that WKCF should be considered part of the market for purposes of the territorial exclusivity rule based on clearly relevant factors. If any of the other five waiver petitioners can make similar showings, they of course would be entitled to similar relief. Thus, we have no intention of treating similarly situated parties differently.

13. Meredith also takes issue with our finding that the waiver was based, in part, on the "unambiguous" facts regarding Clermont's position in the Orlando-Daytona Beach-Melbourne-Cocoa television market. Meredith states that Clermont, located 25 miles from Orlando, is not in the same Standard Metropolitan Statistical Area (SMSA) as any other designated community in the market. Also, WKCF does not place a Grade B contour within 18 miles of Melbourne, FL, one of the cities named in the hyphenated market. These two facts, according to Meredith, require Press' request to be assessed in the context of a rule making. We believe, however, neither of these facts undermines our reasoning in granting Press a waiver. We agree with Press that SMSAs are census subdivisions based on clusters of population and do not necessarily reflect the competitive realities of television stations located both within and outside SMSAs or the television viewing patterns of the populace. Television markets are, however, based on such viewing patterns verified by the major audience rating services. While Clermont is not part of the Orlando SMSA based on popula-

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time. Press involved the waiver of one rule subsection for one station in one market and did not require such extensive analysis. Thus, *VHF* and Press' situation are not comparable.

[6] Meredith also suggests that we should have waited to resolve this issue in the context of General Docket No. 87-24. We indicated, therein, that action on waiver requests generally would be withheld until the completion of the proceeding. However, as we stated in the *MO&O*, "... we are persuaded that the anomalous nature of any decision to be bound by this rule in a way that would hinder the station's ability to compete, warrants a finding that the rule should be waived...." We continue to believe the Commission need not engage in rulemaking to provide relief for a single party in a waiver case. *See generally, WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[7] Meredith cites several cases in support of its position: *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971), (*Greater Boston)*; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio)*; *Sudbrink B/Casting, Inc. of Florida v. FCC*, 509 F.2d 418 (D.C. Cir. 1974); and *Thomas Radio Co. v. FCC*, 716 F.2d 921 (D.C. Cir. 1983) (*Thomas Radio)*. These cases stand for the proposition that the Commission must articulate its reasoning, particularly when changing prior policy (*Greater Boston* and *Thomas Radio)* and when considering a waiver request (*WAIT Radio)*.

tion, it is part of the Orlando television market, for purposes relevant here, based on the viewing habits of its residents as determined by the major ratings services. Further, a station need not place a Grade B contour over every named city in a hyphenated market to be a competitor in that market. As Press points out, other stations in that market do not provide a Grade B signal over all the designated communities.

14. Finally, Meredith argues that, from a policy perspective, our decision will cause more problems than it will resolve. Meredith maintains that Press will reap no benefits from this decision and that viewers will be harmed. We disagree with Meredith's analysis. The Commission determined when it adopted the non-network territorial exclusivity rule that the public interest is enhanced when stations serving the same market area with competitive facilities are allowed to acquire exclusivity against each other. To preclude Press from acquiring non-network territorial exclusivity would unnecessarily hinder WKCF's ability to compete in its local market, and thus would disserve the public interest. Meredith expresses concern that there will be a loss of programming to the public because WKCF is not a local station in some areas of the hyphenated market and is therefore not likely to obtain cable carriage. Meredith also contends that Press will be able to exercise *de facto* syndex rights beyond its 35-mile zone because cable operators will assume that the market has been re-hyphenated. These contentions are merely speculation about possible consequences and do not warrant Commission action at this time. Moreover, the fact that Press is now able to obtain exclusivity throughout the market may in fact provide an added incentive for cable systems to carry its programming. Our experience also gives us no reason to believe cable operators will be less than vigilant about the exercise by broadcasters of syndex rights under the rules.

15. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Meredith Corporation is DENIED.

16. Further information on this proceeding may be obtained by contacting Scott Roberts, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MARY R. KUPRIS, EXECUTRIX OF THE
ESTATE OF ANTHONY C. KUPRIS
(Assignor)

and File No. BALCT-890511KF

WLOS TV, INC.
(Assignee)

For Assignment of License for
Station WAXA-TV, Channel 40,
Anderson, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1991; Released: November 13, 1991

By the Commission:

1. On remand from the United States Court of Appeals for the District of Columbia Circuit, we now grant the application set out in the caption. *See WLOS TV, Inc. v. F.C.C.*, 932 F.2d 993 (D.C. Cir. 1991). The applicants seek the Commission's consent to the assignment of the license for station WAXA-TV, Anderson, South Carolina, from Mary R. Kupris, Executrix of the Estate of Anthony C. Kupris ("Assignor"), to WLOS TV, Inc. ("Assignee"). The Assignee is the licensee of WLOS(TV) (ABC, Channel 13), Asheville, North Carolina, and proposes to operate WAXA-TV as a "satellite" of WLOS(TV) pursuant to the satellite exception to the Commission's multiple ownership rules. *See* 47 C.F.R. § 73.3555 note 5. In this connection, we have recently revised our policies regarding television satellite stations.[1] For the reasons discussed below, we find that the proposed operation of WAXA-TV as a satellite station is consistent with our new policy.

2. In remanding the case, the court noted that the Commission's rulemaking concerning satellite stations remained pending throughout this application proceeding and during the appeal process.[2] On July 8, 1991, we released the *Satellite Report and Order*, which announced that, effective August 14, 1991, we would utilize a revised analytical approach involving a presumption which would be applicable to all new television satellite applications and to those pending as of the effective date of these rule changes. 6 FCC Rcd at 4216. Accordingly, we will apply the subsequently adopted satellite policy to this case on remand.[3]

3. In place of our prior case-by-case analysis of television satellite applications, our new approach provides that applicants for television satellite status will be entitled to a presumption that the proposed satellite operation is in the public interest if the applicants meet the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order*, 6 FCC Rcd at 4213-14. Applications that qualify for the presumption and are unrebutted will be viewed favorably by the Commission. *Id.* at 4214. Even absent rebuttal by an opposing party, however, the Commission may, on its own motion, override the presumption and deny a satellite authorization request where it determines that the public interest so requires. *Id.*

4. Regarding the first of the three criteria, on June 11, 1991, the applicants supplemented their previous engineering studies concerning the degree of overlap between the parent, WLOS(TV), and the proposed satellite station, WAXA-TV. This recent engineering study shows that, while there is predicted overlap of the stations' City Grade contours, there is no actual overlap due to the mountainous terrain in the area lying between the two stations. As stated in the *Satellite Report and Order*, we will accept either the predicted City Grade contour, as defined in Section 73.685(a) of the Commission's Rules,[4] or the actual, terrain corrected contour permitted by Section 73.684 of the Rules.[5] *Id.* at 4214 n. 17. Therefore, after using the terrain roughness correction set forth in Section 73.684, we agree with the applicants that no actual overlap of City Grade contours exists between WLOS(TV) and WAXA-TV. Thus, the satellite proposal meets the first component of the presumption.

5. The second showing applicants must make to qualify for the presumption is that the proposed satellite station would provide service to an underserved area. Applicants can demonstrate that an area is underserved using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it. *Satellite Report and Order*, 6 FCC Rcd at 4215. In this regard, Commission records reveal that WAXA-TV is the only full-service television station licensed to Anderson, South Carolina. Accordingly, the

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[1] *See Television Satellite Stations*, 6 FCC Rcd 4212 (1991)(*"Satellite Report and Order"*)(petitions for partial stay and reconsideration pending).

[2] *See Television Satellite Stations (Notice of Proposed Rule Making)*, 2 FCC Rcd 1359 (1987); *Further Notice of Proposed Rule Making*, 5 FCC Rcd 5567 (1990).

[3] *Cf. Arnold L. Chase*, 5 FCC Rcd 1642, 1646 (1990), *citing Washington Association for Television and Children v. F.C.C.*, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (where the Commission, in an intervening proceeding, has determined that the policy previously applied in similar cases no longer serves the public interest, and therefore will not be applied henceforth, the Commission cannot be required, on remand, to apply a policy it has rejected.)

[4] 47 C.F.R. § 73.685(a). The City Grade contour is also known as the "Principal Community" contour. This section of the rules requires television stations to transmit a particular field strength over the entire principal community to be served. The City Grade contour describes the predicted area that would receive that signal.

[5] *See* 47 C.F.R. § 73.684(f)-(l).

applicants' proposal meets the "transmission test" demonstrating that the satellite station will provide service to an underserved area.[6]

6. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to purchase and operate the proposed satellite as a full-service station. The Assignor states that Mark III Broadcasting Company, Inc. ("Mark III"), whose sole principal was Anthony C. Kupris, acquired WAXA-TV by assignment in October 1982. According to the Assignor's affidavit, the station was offered for sale through a broker during 1986; however, no real interest was shown. In October 1987, Anthony Kupris died and the assets of Mark III were subsequently transferred to the Assignor as Executrix of her husband's estate. The station again was offered for sale through another media broker in early 1988. The broker solicited 66 prospective buyers.[7] At the same time, the Assignor, with her attorney, discussed the sale of WAXA-TV with five others. From these combined efforts, only one "bidder," after a close look at WAXA-TV and its potential as a stand-alone broadcast station, remained interested. Since this potential buyer claimed to have adequate financing for the purchase, the Assignor took the station off the market and attempted to negotiate a final transaction during July 1988. According to her affidavit, the Assignor agreed to finance the purchase at $2,300,000 over a seven-year period but required a $500,000 down-payment. Negotiations were suspended, however, when it became apparent that the potential buyer did not actually have the necessary financing to make the initial payment or to operate the station. The station again was placed on the market and no serious buyers came forward. Eventually, in April 1989, the Assignor agreed to sell WAXA-TV to the licensee of WLOS(TV). Based on the specific evidence provided, it is apparent that the Assignor has made diligent efforts to find a buyer that would operate WAXA-TV as a full-service station, but has been unable to do so. Thus, the applicants have satisfied the third criterion.

7. Therefore, we find, in meeting the above three criteria, the applicants are entitled to the presumption that the proposed satellite operation of WAXA-TV is in the public interest. In addition, no showing has been provided to rebut the presumption and we find no reason to override the presumption on our own motion. In view of the foregoing, having determined that the applicants are qualified in all other respects, we find that grant of the application would serve the public interest.[8]

8. Accordingly, IT IS ORDERED, That the above-captioned application (BALCT-890511KF) for consent to the assignment of the license for station WAXA-TV, Anderson, South Carolina, from Mary R. Kupris, Executrix of the Estate of Anthony C. Kupris, to WLOS TV, Inc. IS GRANTED.

9. The Mass Media Bureau shall send copies of this *Memorandum Opinion and Order* to the applicants by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[6] This finding obviates the need to explore the second, alternative test -- the "reception test" -- whereby an area would be considered underserved if 25 percent or more of the area within the proposed satellite's Grade B contour (but outside the parent's Grade B contour) receives four or fewer services, not including the proposed satellite service. *Id.*

[7] This broker also submitted a sworn affidavit setting forth the details of his service to the Assignor.

[8] A petition to deny was filed against the original application, but the petitioner subsequently withdrew from further participation in the proceeding. Nevertheless, we have reviewed the petitioner's arguments, which do not address our new satellite policy, and conclude they present no basis for denying the application under our new policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

WWOR-TV, INC. BTCCT-901127KE

For Transfer of Control of
WWOR-TV, Inc., Licensee of
Station WWOR-TV, Channel 9
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 13, 1991

By the Commission:

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INTRODUCTION

1. In *WWOR-TV, Inc.*, 6 F.C.C. Rcd. 193 (1990), we approved the transfer of control of station WWOR-TV (channel 9, Ind.), Secaucus, New Jersey, from its then parent, MCA, Inc. (MCA), to Pinelands, Inc. (Pinelands),[1] a new entity that is owned substantially by the same shareholders that formerly owned MCA.[2] In our decision, we also denied three informal objections, one of which had been filed by Whitely Communications (Whitely).[3] We consider here petitions for reconsideration of that action, timely filed on January 25, 1991, by Whitely and by the Committee for American Interests in Media (the Committee), which did not participate at the first stage of this proceeding.[4] We shall dismiss both petitions for reasons that follow.

PRELIMINARY MATTERS

2. *Procedural Posture of the Petitioners.* Parties wishing to participate formally on reconsideration must, among other things, establish that they are "person[s] aggrieved or whose interests are adversely affected" by our grant of the application, within the meaning of section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405. As we previously ruled, and confirm below, the transaction before us is one of form, not substance. We would expect, therefore, that parties asserting a formal right to participate on reconsideration would plead facts to establish how the change in form approved in our earlier decision aggrieved them or adversely affected their interests. *See California Association of the Physically Handicapped v. FCC*, 778 F.2d 823 (D.C. Cir. 1985)(ruling that for the purposes of judicial review, a petitioner was not aggrieved by the grant of a *pro forma* transfer application). Neither party has met the pleading requirements of section 405 of the Act.

3. Whitely has never explicitly stated the basis for its legal interest in this case, but we note that it was once an applicant in the pending renewal/new applicant comparative hearing for channel 9, Secaucus. The Commission ultimately dismissed that application, *WWOR-TV, Inc.*, 5 F.C.C. Rcd. 3768, *reconsideration denied*, 5 F.C.C. Rcd. 7656 (1990), and the court later dismissed Whitely's appeal of that action. *Whitely Communications v. FCC*, No. 90-1593 (D.C. Cir. Mar. 14, 1991). Whitely's role as a former applicant grants it no legally cognizable interest in this transfer proceeding.[5]

4. The Committee predicates its interest in this proceeding on the assertion that its members are viewers of station WWOR-TV. That assertion is not supported by the necessary affidavit, and the Committee's petition must be

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[1] Pinelands was initially known as Newco, Inc., but changed its name after our first decision in this case.

[2] The applicants closed the spin-off to Pinelands, and Matsushita Electrical Company, Ltd. (Matsushita), a Japanese company, thereafter acquired MCA pursuant to a tender offer.

[3] We also considered and denied Whitely's motion for stay and its petition to revoke the station WWOR-TV license.

[4] Related pleadings are: Pinelands' oppositions to both petitions, filed February 7, 1991; and replies filed February 20, 1991, by Whitely and the Committee.

[5] The court had not dismissed Whitely's appeal at the time Whitely filed its petition for reconsideration. Whitely's lack of legal interest in the transfer case would not be affected, however, even if it were still an active applicant in the comparative proceeding. As we stated in our first decision, the spin-off of station WWOR-TV did not "terminate the comparative hearing or extinguish whatever rights Whitely" then possessed. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 205. Further, WWOR-TV, Inc., is still the licensee seeking renewal on the same broadcast record and is still accountable for that record. Upgrading its comparative position would not have been permitted. Thus, Whitely was not an aggrieved party at the time it filed its initial objection or its petition for reconsideration based on the possibility that the court might have reinstated its channel 9 construction permit

dismissed on that ground.[6] Nevertheless, both petitioners raise matters not previously considered. In our discretion, therefore, we shall consider the merits of the pleadings.[7]

5. *Alleged Ex Parte Communications.* On November 29, 1990, an objector filed a formal opposition, as defined by section 1.1202(e) of the Rules, 47 C.F.R. §1.1202(e), against the grant of the transfer application. The proceeding therefore became restricted and the rules prohibiting *ex parte* communications attached on that date. Whitely alleges that prohibited *ex parte* communications occurred between representatives of MCA/Pinelands and the Commission. Its first ground for that position is the following quotation from our first decision:

> [An objector] finds questionable MCA's role in nominating the proposed [Pinelands] Board. As a practical matter, we do not see how [MCA] could not have a role, because it is creating [Pinelands] as a means to eliminat[e] the alien ownership problem.

WWOR-TV, Inc., 6 F.C.C. Rcd. at 202 n. 19. Whitely reads the word "problem" to refer to compliance with the 25-percent guideline as to alien ownership specified in section 310(b)(4) of the Act. Because MCA or Pinelands filed nothing indicating the existence of such a problem, Whitely surmises that the quoted language must have been based on off-the-record discussions with the Commission as to MCA's motivations and the means by which it sought to eliminate the asserted problem. Because the ownership of MCA (prior to its acquisition by Matsushita) and Pinelands would be substantially the same, however, the transfer would not resolve any problem relating to the 25-percent guideline, if one existed. Instead, the problem referred to in the quoted language was the fact that Matsushita, a foreign company, could not take over MCA as long as MCA controlled WWOR-TV, Inc. The spin-off to Pinelands did resolve that problem, which was fully described in the application and in the material filed with the Securities and Exchange Commission (SEC). The mention in the footnote of an alien-ownership problem was thus part of the public record and provides no evidence of any *ex parte* communication.

6. The second basis for Whitely's *ex parte* allegation is the statement that "three current MCA principals will acquire nonvoting, preferred stock in MCA's immediate parent" after its acquisition by Matsushita. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 200 n. 13. In Whitely's opinion, this statement is evidence of *ex parte* communications because the facts alluded to were not mentioned in the materials submitted to MCA shareholders. The purpose of the footnote was to distinguish this case from an earlier case that had required divestiture of stock. We concluded that no divestiture was required in the circumstances of the case before us. The identity and number of persons acquiring preferred stock was not specifically relevant to that determination. The three persons referred to as not having to divest were MCA principals Geffen, Sheinburg and Wasserman, and the statement was based on language on pages 40 and 41 of the Schedule 14D-9 sent to MCA shareholders. That Schedule mentions all three of those persons, but on closer reading, and as correctly noted by Whitely, does not include Messrs. Sheinburg and Geffen as receiving preferred stock. The identification of those persons in the footnote did not affect the result of this proceeding, did not reflect the agreements between the two individuals and Matsushita, and was simply a misapprehension. There were in fact no prohibited *ex parte* communications, and the minor misstatement on an immaterial point provides no probative evidence to the contrary.[8]

USE OF SHORT-FORM PROCEDURES

7. We noted in our first decision that section 309(c)(2)(B) of the Act permits summary procedures to be used in processing applications for transfers of control that do not involve a "substantial change in ownership or control." We also observed that subsection 73.3540(f)(5) of the Rules specifically permits the use of summary or "short-form" procedures "where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests...." We concluded that the rationale underlying the rule also applied to transfer applications and that the Pinelands spin-off qualified for summary procedures. Whitely contests that conclusion on the ground that the number of MCA shareholders diminished from 7800 before the spin-off to about 6600 after. As stated in our first decision, former MCA shareholders received one share of Pinelands stock for every five MCA shares they owned. The reduction in the number of shareholders followed primarily from the fact that those persons holding less than five shares, such as Whitely, received cash instead of Pinelands stock. In Whitely's view, a reduction of 1200 shareholders (15.3 percent) was substantial and the transaction did not qualify for summary procedures.

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application.

[6] By letters dated February 15, 1991, the staff gave Pinelands, Whitely and the Committee the opportunity to submit any affidavits they believed appropriate to support factual allegations in their pleadings regarding matters of which the Commission could not take official notice. The Committee did not respond.

[7] In reviewing the merits of the petitions for reconsideration, we use the analytic framework provided by the Act. That is, using specific facts of which we can take official notice or that are supported by affidavits from persons with first-hand knowledge of the facts alleged, we determine first whether the petitioners' facts, if true, establish on their face that a grant of the application would be inconsistent with the public interest. In that event, we then look to the facts set out in the application and alleged in the applicants' pleadings to determine whether a substantial and material question of fact is presented. If so, a hearing is required. If not, the application can be granted without a hearing. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985).

[8] Two final preliminary matters warrant brief discussion. Pinelands and MCA agreed before the spin-off to use their best efforts to retain certain employees by encouraging new employment agreements after the spin-off. The Committee contends that the failure to include a list of the employees in question rendered the application "fundamentally incomplete and subject to return." We do not require as a part of the application normal employment contracts or lists of persons considered important to retain as employees. The failure to do so, therefore, does not render the application incomplete. The Committee also suggests that the effort to retain those employees might reflect on Pinelands' compliance with our rules and policies on equal employment opportunity (EEO). That subject will be reviewed below under applicable standards.

8. Whitely cannot cite precedent to support its position. The definition of a "substantial" ownership change developed in our case law. *See, e.g., Grace Missionary Baptist Church,* 80 F.C.C.2d 330 (1980); *Barnes Enterprises, Inc.,* 55 F.C.C.2d 721 (1975); *Clay Broadcasters, Inc.,* 21 R.R.2d 442 (1971). Those cases establish that changes in the ownership of voting stock of less than 50 percent are not "substantial" within the meaning of section 309(c)(2)(B) of the Act. Moreover, we focus on the number of votes that change hands, not the number of shareholders, in determining when a change is or is not "substantial." *Grace Missionary Baptist Church,* 80 F.C.C.2d at 336. In this case, the reduction of about 1200 shareholders represents a maximum of 4800 shares, which is an insignificant part of the approximately 75 million shares of MCA stock that had been issued before the tender offer, or the roughly 15 million shares of the issued Pinelands stock. In addition, those holding more than five MCA shares, but in amounts not evenly divisible by five, received cash for their "odd" shares. For example, a person owning 104 MCA shares received 20 Pinelands shares plus cash for the four odd shares. The maximum reduction in the proportional number of outstanding shares would still not be significant.[9] In fact, if the percentage reduction in shareholders or shares resulting from the five-to-one conversion ratio were the only factors present in this case, no transfer application would have been required. *See Turner Broadcasting System, Inc.,* 101 F.C.C.2d 843, 848 (1985)(the retirement of 21 percent of the voting stock of a publicly traded corporation does not require Commission approval under section 310(d) of the Act).[10] The transfer application in this case was required to recognize the corporate reorganization that occurred by the introduction of a new holding company, Pinelands.

9. Whitely observes that MCA Chairman Lew Wasserman worked out a separate "capital contribution agreement" with Matsushita involving Wasserman's holdings (about seven percent) of MCA shares.[11] Whitely alleges that at least thirty days before the parties closed the tender offer, Matsushita "had control over a series of the key indicia of ownership of" Wasserman's stock, which assertedly gave Matsushita negative control of that stock. Whitely does not, however, specifically identify the indicia it relies upon in reaching its conclusion. In that regard, the restrictions set out in the SEC filings indicate only that Wasserman could not sell the shares that were the subject of the capital contribution agreement, nor could he grant any proxies or enter into voting agreement regarding those shares, or deposit them into a voting trust. It appears, therefore, that Wasserman could not encumber the shares subject to the agreement, but retained ownership and voting rights in his stock during the period in question. Whitely's general statements do not establish that Matsushita held negative control over the Wasserman shares, or, more importantly, that holding negative control of such a seven-percent block makes the transaction "substantial." In sum, Whitely has not established the need for anything other than short-form procedures.

10. The Committee also challenges the use of the short form in this case. It believes that significant issues are raised in its petition. Based on that belief, the Committee concludes that long-form procedures are required. It is of course true that significant issues can be raised in connection with short-form applications.[12] Nonetheless, under the statute, the nature of the transaction governs the procedures that apply, not the significance attached by a petitioner to specified issues.

11. At another point in its pleading, the Committee may be asserting another ground for classifying the transfer as "substantial." As noted above, efforts were made to retain certain of the licensee's employees after the spin-off. The Committee states that such inducements would be unnecessary if "ownership were really unchanged." Again, we look to the nature of the proposed transfer to determine whether it should be considered substantial or insubstantial under the Act. Efforts to encourage continuity of employment have not entered into that balance in the past, and we perceive no reason to do so here. We therefore reject the Committee's arguments. Accordingly, neither petitioner has alleged facts that on their face require use of long-form procedures in this case.[13]

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[9] Assuming that each of the 6600 remaining shareholders held the maximum four odd shares, the reduction in MCA shares outstanding would be 26,400 (4 x 6600), or about 0.036 percent of the total MCA shares outstanding.

[10] We recognize that other changes in stock ownership occurred, but those changes do not alter our conclusion. Specifically, we noted in our first decision the existence of MCA debentures and preferred stock that were convertible to MCA common stock. 6 F.C.C. Rcd. at 198-99 n. 12. We stated that even if all such debentures and preferred stock were converted to MCA common stock before the Matsushita takeover of MCA, the resulting percentage increase in issued shares (less than 16 percent) would not require the use of long-form procedures. *Id.* Moreover, we understand that as a result of innumerable sales of small blocks of stock of a publicly traded company, ownership of more than 50 percent of the corporation's stock may change hands over time. Such a change has never required prior Commission approval for a variety of reasons, including: (1) the buyers are not acting in privity; (2) individual transactions represent very small percentages of the total shares issued, and are typically not cognizable under our Rules; (3) no person acquires or loses *de facto* or *de jure* control as a result of such small-share transactions; and (4) there are strong public interest factors for not imposing the Commission's prior-approval requirements into the normal functioning of the stock market. Just as changes over time in the membership of a Board of Directors of a publicly traded corporation need no prior approval, *Storer Communications, Inc.,* 101 F.C.C.2d 434, 448 n. 10, *aff'd,* 763 F.2d 436, 442 (D.C. Cir. 1985), similar changes over time as to stock ownership of publicly traded companies as a result of thousands of small-share transactions, none of which results in the acquisition or loss of *de facto* or *de jure* control, do not require our prior approval. Finally, we shall not address Whitely's speculations as to the propriety of the use of the short form in factual contexts not before us here.

[11] Wasserman also received a proportionate share of Pinelands stock. See SEC Schedule 14D-9, p. 14. That fact eliminates any percentage change in Wasserman's holdings in the parent of the licensee after the spin-off.

[12] Our ruling in *Storer Communications, Inc.,* 101 F.C.C.2d 434, *aff'd,* 763 F.2d 436 (D.C. Cir. 1985), provides an example.

[13] An additional matter raised by the Committee in its pleadings in relation to the propriety of using the short form concerns an option held by Matsushita to buy up to 18 percent of MCA's shares, in the event that the tender offer did not go through. We stand by our conclusion that the option, which was never exercised, was not decisionally significant. *WWOR-TV, Inc.,* 6 F.C.C. Rcd. at 198 n. 11. Among other things, we noted there that in the context of an alien-ownership question, an option held by an alien to buy stock in a licensee or the parent of a licensee is not cognizable until exercised. *See Data Transmission Co.,* 52 F.C.C.2d 439 (1975). *See also Attribution of*

SUBSTANTIVE ISSUES

12. *Alleged Impermissible Alien Ownership.* Section 310(b)(4) of the Act provides that, if the Commission finds that it would not serve the public interest, aliens cannot own or vote of record more than 25 percent of the stock of companies like Pinelands. We stated in our first decision that a licensee's obligation to comply with section 310(b) is continuous, but that we have never required publicly traded companies to conduct ongoing surveys to assure compliance, particularly where the most recent survey showed alien-ownership figures well under the 25-percent guideline. Further, we observed that a licensee would not ordinarily be required to certify its compliance with the statute until it filed its next renewal application and that we would not require a new survey in connection with a short-form transfer application in the absence of a well-founded question as to compliance with the Act. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 198. We determined that Whitely had not raised such a question so there was no basis for assuming that the results of the last survey were significantly changed. We also found that even if we made the assumptions most favorable to Whitely, the amount of alien-owned stock would be about 17.35 percent. *Id.* at 199. We therefore concluded that no substantial and material question of fact existed as to compliance with the Act.

13. Whitely challenges that conclusion essentially on the ground that the licensee's last alien-ownership survey, conducted in 1986, cannot be relied upon because of its age. Whitely's figures[14] establish that MCA was an actively traded stock since the last survey. Nonetheless, Whitely has still provided no specific facts that would alter our earlier conclusion that the turnover of shares would appreciably alter the percentage of alien ownership. The staff, however, noted that Pinelands had identified stockholders with foreign mailing addresses for IRS purposes, and requested pertinent information. Although relying on mailing addresses is not a substitute for a random survey, the information provided by Pinelands indicates that only 0.06 percent of its shares are held by persons or entities with foreign mailing addresses. Pinelands further states that it has preliminary results of a nonscientific survey that tentatively shows alien ownership of about 1.5 percent. Both of these more recent figures are well under the 25-percent guideline. We conclude, therefore, that there is no substantial or material question of fact as to Pinelands' compliance with section 310(b) of the Act and that there is no basis for requiring at this time a specific survey for alien ownership purposes.[15] We expect that Pinelands will generally monitor the alien ownership of its shares and, in connection with the preparation of any subsequent renewal application, will use reasonable methods to insure compliance with section 310(b).

14. *Alleged Impermissible Alien Control or Influence.* Section 310(b)(4) of the Act permits up to 25 percent of Pinelands' stock and 25 percent of the positions on its Board of Directors to be held by aliens. Thus, we noted in our first decision that the statute recognizes a limited degree of alien influence. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 199-200. We concluded that the organization of Pinelands and its relationship with alien-controlled MCA after the tender offer did not grant MCA control of, nor did it accord MCA an impermissible degree of influence over, Pinelands. *Id.* at 201-05. The Committee does not allege any additional facts on that point, and we need not restate the basis for our conclusion here. The Committee appears to suggest a higher level of scrutiny because of a need to "harmonize" Japanese traditions with American values. The statute provides our point of reference in reviewing the extent of alien ownership or influence in United States licensees. In that regard, all of Pinelands' Directors are United States citizens and we believe that its stock ownership is far under the applicable guideline. Matsushita owns no Pinelands stock. Two of Pinelands' eight Directors are also senior MCA officials. Even if we assume that those two persons are representatives of Matsushita-controlled MCA, no violation would exist, because they represent only 25 percent of the Pinelands Board.[16] We also note that our action involved only the

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Ownership Interests, 97 F.C.C.2d 997, 1021-22 (1984), *reconsidered on other grounds*, 58 R.R.2d 64 (1985), *further considered*, 1 F.C.C. Rcd. 802 (1986)(options are not cognizable until exercised, for the purposes of administering the multiple- and cross-ownership rules). The Committee correctly observes that in comparative broadcast cases the Commission has adopted a rebuttable presumption that options will be exercised, *see Washington Christian TV Outreach, Inc.*, 94 F.C.C.2d 1360, 1366 (Rev. Bd. 1983)(subsequent history omitted), and asserts that it is arbitrary to treat options in the transfer context differently from options in comparative cases. We disagree with that assertion. The comparative position of applicants in comparative cases becomes fixed early in the hearing process; that is, no later than the end of the period when applicants can file amendments as a matter of right. *See Revision of Form 301*, 4 F.C.C. Rcd. 3853, 3860-61 (1989). Such cases cannot be efficiently processed if the comparative positions of applicants change throughout the hearing. The presumption that options will be exercised in that context helps to provide a fixed factual base, makes the hearing more efficient, and thus speeds service to the public. *See id.* at 1366 n. 9. In contrast, section 310(d) of the Act directs us to consider only the qualifications of the seller and proposed buyer. There is no comparison between applicants and, accordingly, no need to establish a fixed factual base for comparative purposes. Further, in the transfer context, the station is typically operating, and any delays that might follow from changes in the ownership of the proposed buyer do not deprive the public of service. Changes in attributable ownership and positional interests of the applicants' principals will be reported in amendments to pending transfer applications, with no prejudice to any other party or the public. No presumption that an option will be exercised is therefore required in the transfer context. Accordingly, the *Data Transmission* and *Attribution* decisions govern here, and Matsushita's unexercised option is not relevant to our decision.

[14] Whitely asserts that in the years from 1987 through 1990, the number of MCA shares issued was about 73 to 75 million, and that the volume of shares ranged from a low of about 53.8 million in 1988 to a high of about 110.8 million in 1990.

[15] Whitely contends that Pinelands knew of an alien ownership "problem" as allegedly evidenced by language in our first decision. As noted above in paragraph five, Whitely misapprehends the problem alluded to, and there is no foundation for its arguments based on a problem assertedly "known" to Pinelands/MCA with regard to the 25-percent guideline.

[16] The Committee also characterizes the presence of two MCA officials on the Pinelands Board as "inherently suspect and potentially horizontally anticompetitive between competing media producers and distributors." Whatever potential problems there might be in that area, however, they would have been worse prior to the spin-off of station WWOR-TV from MCA, because MCA, a major production studio, controlled the station.

television station. Contrary to the Committee's position, we believe the purchase of MCA, minus its broadcast assets, by an alien company is not a matter relevant to our determination.

15. *Alleged Misrepresentations.* When addressing allegations of misrepresentation, we expect petitioners to set out facts that, if true, would establish on their face that an applicant has intentionally submitted false information. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 206. Whitely asserts that Pinelands/MCA made misrepresentations to the Commission by stating to us that there was no problem with the percentage of alien-owned stock, when Pinelands "knew" that there was such a problem. For the reasons set out above in paragraph five, we have concluded that there is no basis established by Whitely that such a problem exists, and we are not independently aware of such a problem. Whitely observes that the material sent to MCA shareholders as a part of the tender offer noted that IRS regulations required withholding partial payment to stockholders at foreign addresses. That fact establishes only that MCA was aware of IRS requirements, not that it was aware of a problem with the 25-percent guideline as to alien ownership. Similarly, Pinelands amended its Articles of Incorporation to insert provisions to assure that it would remain within the 25-percent guideline. Although Whitely characterizes the amendments as "unusual and extreme," such ownership limitations are not unique to Pinelands. *See McCaw Cellular Communications, Inc.*, 4 F.C.C. Rcd. 3784, 3785 (Com. Car. Bur. 1989)(the licensee "has the right under its articles... to redeem stock held of record or voted by non-U.S. citizens to ensure compliance" with section 310(b)(4)). Those provisions provide a mechanism for avoiding the problem alleged by Whitely and, in our view, are evidence of a desire to stay within the law, not evidence of an existing violation.

16. Whitely also alleges inconsistencies with respect to the transaction, described above, between Matsushita and MCA Chairman Wasserman, and contends that the asserted inconsistencies are another misrepresentation. Specifically, Whitely notes that in the application MCA/Pinelands described the Pinelands spin-off as involving no substantial change in ownership. Wasserman also negotiated a separate transaction in which he would exchange his MCA common stock for preferred stock in MCA's surviving parent, and, according to Whitely, Matsushita allegedly gained negative control over the common shares held by Wasserman before the tender offer closed. Whitely claims that the Wasserman transaction was inconsistent with the claimed insubstantial nature of the transfer and was thus a misrepresentation.[17] As noted above in paragraph nine, a seven-percent change in stock ownership would not make the transaction "substantial," within the meaning of section 309(c)(2)(B) of the Act. Further, the SEC materials upon which Whitely relies specifically disclosed the Wasserman/Matsushita transaction, and that material does not support Whitely's assertion. The Schedule 14D-9 sent to MCA shareholders describing the tender offer states at page 14 that the Wasserman/Matsushita agreement would not close until "immediately following the time at which [MCA] shares are accepted for payment pursuant to the terms of the [tender] offer." Thus, the terms were disclosed, and Matsushita did not gain control of Wasserman's MCA common shares, under the terms of the agreement, until after closing of the tender offer. Whitely has not alleged any specific facts on the alleged premature assumption of control of Wasserman's stock.[18] In fact, Whitely characterizes its allegations as "involving *possible* premature control" of Wasserman's shares by Matsushita. Emphasis added. Matters that are "possible" do not constitute specific allegations of fact. No misrepresentation to the Commission is apparent from the above. We conclude that Whitely has failed to allege facts that, if true, would establish on their face that Pinelands or MCA made false statements or lacked candor, or that they intended to deceive the Commission.

17. *Petition to Revoke.* As noted at the outset, we also denied in our first decision Whitely's petition to revoke the station WWOR-TV license. Part of that petition rested on alleged misrepresentations to the Commission, which we rejected initially and again in this decision. Accordingly, there is no basis for a revocation proceeding on that ground. Further, Whitely alleges that station WWOR-TV has abandoned its obligation to serve Secaucus and northern New Jersey, and is instead serving New York City. Whitely is correct in observing that the station competes for viewers and advertising in the greater New York City market. The station's transmitter is located on top of the World Trade Center in New York City, just across the river from its Secaucus studio. The Commission has never suggested that any station is required to ignore the fact that its signal reaches areas or communities other than its city of license, or to avoid the advertising revenues that might flow from viewership in those areas. Instead, the standard for review of allegations concerning a station's performance was described fully in our first decision. *WWOR-TV, Inc.*, 6 F.C.C. Rcd. at 205-06. In this case, that standard focuses on the licensee's responsiveness to the issues confronting Secaucus and northern New Jersey. Whitely has alleged no facts concerning the station's performance under the relevant standard.

18. Whitely also alleges that station WWOR-TV broadcasts a television version of the "Howard Stern Show," which Whitely characterizes as obscene or indecent. Whitely requests revocation of the WWOR-TV license on this ground. We reject that request. Whitely does not state the time of broadcast of the program, but other information on file establishes that the program is normally aired

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We note that we found no basis for acting on a similar allegation of anticompetitive conduct when MCA acquired the station (through its subsidiary, GTH-101) in 1986. *RKO General, Inc. (WORTV)*, 1 F.C.C. Rcd. 1081, 1089 (1986). In any event, our policy is to consider only adjudicated violations of laws concerning media-related anticompetitive conduct. *Character Qualifications*, 102 F.C.C.2d 1179, 1201, *reconsidered in part*, 1 F.C.C. Rcd. 421 (1986), *as modified*, 5 F.C.C. Rcd. 3252, *reconsidered in part*, 6 F.C.C. Rcd. 3448 (1991). We are not aware of any adjudicated violations of such laws by Pinelands or by MCA, when it controlled the licensee of station WWOR-TV.

[17] As noted above in footnote 11, Wasserman also received Pinelands stock, along with the rest of MCA's former shareholders. Whitely errs, therefore, to the extent that it suggests that the Wasserman transaction significantly altered the ownership of the licensee.

[18] Whitely asserts that the Wasserman/Matsushita transaction was negotiated before the tender offer. Even if true, we find no misrepresentation as to that fact. It is the date of exercise of contractual rights that governs questions of control, not the date on which the parties negotiated or executed the contract.

by the station at 11:00 p.m. In *Kansas City Television, Ltd. (KZKC),* 4 F.C.C. Rcd. 6706 (1989), we vacated our earlier enforcement action against a licensee for airing indecent material at 8:00 p.m., on the ground that the court's decision in *Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988), "effectively preclud[ed] enforcement against evening broadcasts." 4 F.C.C. Rcd. at 6706. Nothing since that decision has altered the legal predicate upon which it was based. *See Action for Children's Television v. FCC,* 932 F.2d 1504 (D.C. Cir. 1991), *reh'g denied,* Aug. 28, 1991. Accordingly, we do not reach the merits of Whitely's allegation, because an assertedly indecent broadcast at or after 11:00 p.m. is beyond our enforcement jurisdiction.

19. We also reject Whitely's request to the extent that the specific "Howard Stern Show" of which he complains was allegedly obscene. Obscene material may never be broadcast and our enforcement authority with respect to such material is not constrained by time-of-day considerations. Whitely has offered no information to substantiate its claim, however, other than the bare allegation that the one program contained nudity. Given the strict criteria applicable to obscenity determinations set out in *Miller v. California,* 413 U.S. 15 (1973),[19] and in the absence of any specific or direct evidence to support Whitely's obscenity allegation, we find that Whitely has failed to allege facts that establish on their face that a violation exists.

20. *Alleged Equal Employment Opportunity Violations and the Related Request for the Early Filing of the WWOR-TV License Renewal Application.* The Committee asks us to order the early filing of the WWOR-TV license renewal application on the grounds that the licensee has engaged in discriminatory employment practices and failed to maintain an effective EEO program. In opposition, Pinelands contends that it has a demonstrated record of "innovative and robust commitment to the Commission's EEO goals."

21. We ordinarily review a licensee's performance under our EEO policies and rules at renewal time, not when processing shortform transfer applications. *See Metromedia, Inc.,* 98 F.C.C.2d 300, 302 n. 2 (1984). Nonetheless, section 73.3539(c) of the Rules provides that we can call for the early filing of a station's license renewal application. We have stated, however, that we would call for such an early filing only for "compelling reasons." *Sioux Empire Broadcasting Co.,* 9 F.C.C.2d 683, 684 (1967). Further, "persons seeking the extraordinary, discretionary action of... the early filing of a renewal application, because of alleged 'compelling reasons' should, at a minimum, support their requests with factual allegations meeting the requirements" for petitions to deny set out in section 309(d) of the Act. *Greater Portland Broadcasting Corp.,* 3 F.C.C. Rcd. 1953, 1954 (1988).[20] For reasons set out below, we conclude that the Committee has failed to meet the burden of pleading required for the early filing of the WWOR-TV license renewal application.

22. Section 73.2080 of the Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, we focus on the licensee's efforts to recruit, employ and promote qualified women and minorities, and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the job applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See Equal Employment Opportunity in the Broadcast Services,* 2 F.C.C. Rcd. 3967, 3973-74 (1987), *clarification denied,* 4 F.C.C. Rcd. 1715 (1989), *petition for reconsideration pending.*[21]

23. The Committee, relying primarily on statistical information, first asserts that the licensee has engaged in discriminatory hiring practices because of an alleged substantial disparity between the station's employment of Blacks overall and their representation in the relevant labor force.[22] Our review indicates, however, that the station's work force does not suffer from a substantial statistical disparity for Blacks overall or in the upper level positions. Thus, the Committee's statistical allegations neither support the inference advanced nor present a compelling reason for the early filing of the WWOR-TV renewal application.

24. Second, the Committee criticizes the licensee's employment of only one Black in a managerial position and one Black in a sales position as reported in the station's 1990 Annual Employment Report. We have consistently stated, however, that we will not look at individual job categories in assessing EEO performance. Instead, we look at a station's overall employment, including the upper level job categories as a group. *Carolina Christian Broadcasting, Inc.,* 3 F.C.C. Rcd. 1907, 1909 (1988); *Miami Valley Broadcasting Corp.,* 86 F.C.C.2d 775 (1981). Thus, the licensee's alleged failure to employ a "sufficient"

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[19] Among other things, an obscenity determination requires a finding that a program, "taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* at 24.

[20] The following matters are relevant to our review of the Committee's allegations and provide additional support for the use of a high burden of pleading in this case. As noted above, the WWOR-TV license renewal application is already in comparative hearing. Starting a second renewal hearing or expanding the existing hearing to add new parties and issues before the conclusion of the ongoing proceeding raises difficult problems as to the orderly disposition of the Commission's business. *See City of Angels Broadcasting, Inc. v. FCC,* 745 F.2d 656, 664 (D.C. Cir. 1984). Moreover, the Committee could have acted so as to avoid those problems by filing a timely petition to deny the renewal application, but did not do so. Where a person or entity has an opportunity to participate in our proceedings in the ordinary course, we are most reluctant to permit the introduction of new parties and issues by means of the extraordinary action of ordering the filing of an early renewal application. We also note that no party to the renewal proceeding questioned Pinelands' past EEO performance. Finally, because we have determined that the transfer is one of form, we include within our review the EEO performance of Pinelands' corporate predecessor, MCA.

[21] We shall not consider the Committee's contentions to the extent that they are based on the licensee's EEO efforts during the prior license term. *See Radio Para La Raza,* 40 F.C.C. 2d 1102, 1104 (1973).

[22] The Committee criticizes Pinelands' use of the Jersey City Metropolitan Statistical Area (MSA), arguing that the appropriate labor force is the New York City MSA. In our view, Pinelands' use of the Jersey City MSA is correct, because Secaucus, New Jersey lies within the Jersey City MSA. *See Michigan/Ohio Renewals,* 3 F.C.C. Rcd. 6944, 6950 n. 22 (1988).

number of Black managers or salespersons does not constitute a compelling reason to order the early filing of the WWOR-TV renewal application.

25. Third, the Committee alleges that the licensee has failed to contact minority sources and to make a strong commitment to training and internship programs. It appears, based on Pinelands' showing, that it does contact minority sources. In addition, we note that our rules do not require training or internship programs, although we do recognize any such voluntary licensee efforts. *Equal Employment Opportunity in the Broadcast Services,* 2 F.C.C. Rcd. 3967, 3973 (1987); *Turner Broadcasting Corp.,* 87 F.C.C.2d 476, 479 (1981).[23]

26. Fourth, the Committee generally claims that "grave EEO consequences" flow from an agreement whereby Pinelands may pay inducements to certain individuals to encourage them to remain at the station. This allegation is vague, speculative and unsupported by any information demonstrating that the agreement is discriminatory.

27. Based on the above, we find that the Committee has failed to demonstrate compelling reasons for ordering the early filing of WWOR-TV's license renewal application.

CONCLUSION

28. Although the petitions for reconsideration are procedurally defective, we have reviewed them carefully. For the reasons stated above and in our first decision, we conclude that the petitioners have either failed to allege facts to establish that a grant of the transfer application was, on its face, inconsistent with the public interest, or have failed to raise any substantial and material question of fact.

29. Accordingly, IT IS ORDERED THAT the petitions for reconsideration filed by Whitely Communications and by the Committee for American Interests in Media ARE DISMISSED, and ARE DENIED when considered informally, and that our action granting the application (BTCCT-901127KE) IS AFFIRMED.

30. IT IS FURTHER ORDERED, that the request of the Committee for American Interests in Media for the early filing of a WWOR-TV license renewal application IS DENIED.

31. The staff of the Mass Media Bureau is directed to send copies of this decision to the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[23] These cases are consistent with the case cited by the Committee, *Employment Practices of Broadcast Licensees,* 18 F.C.C. 2d 240 (1968), in support of its position. We stated there that licensees "might consider" a variety of means to further affirmative action, including training programs. *Id.* at 245. Training programs were therefore not deemed mandatory.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 13, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

Brown University (Uri Bar Zemer) - Request for refund of filing fee - **Granted** (June 13, 1991).

KMDX-FM 99, Inc. - Request for hearing fee refund for a FM station at Parker, Arizona - **Granted** (October 1, 1991).

Furniture City Broadcasters, Inc. - Request for hearing fee refund for a new FM station at Lenoir, North Carolina - **Denied** (October 3, 1991).

CDD Broadcasting - Request for hearing fee refund for a new FM station at Ocean City, Maryland - **Granted** (October 3, 1991).

Seeway Broadcasters - Request for Reinstatement for a modification to its license covering a low power TV station at Fremont, Ohio - **Granted** (October 8, 1991).

James C. Sliger - Request for hearing fee refund for a new FM station at Westwood, Kentucky - **Granted** (October 8, 1991).

Healdsburg Broadcasting, Inc. - Request for Reinstatement for a new FM station at Healdsburg, California - **Granted** (October 8, 1991).

Life Broadcasting, Inc. - Request for refund of hearing fee for station KTNT-FM, Edmond, Oklahoma - **Granted** (October 11, 1991).

Porter H. Davis - Request for refund of hearing fee for station KTNT-FM, Edmond Oklahoma - **Granted** (October 11, 1991).

Keith L. Miller, Jr. - Request for refund of hearing fee for a new FM radio station at Newport, Oregon - **Granted** (October 17, 1991).

Robert D. & Jenifer L. Weerts - Request for refund of hearing fee for a new FM station at Blue Earth, Minnesota - **Granted** (October 17, 1991).

Kramer Broadcasting, Inc. - Request for refund of filing fee for station WDDC(FM), Portage, Wisconsin - **Granted** (October 17, 1991).

Innovative Advertising Consultants, Inc. - Request for refund of rule making fee paid to modify the construction permit of Station WGUY(FM), Dexter, Maine - **Granted** (October 18, 1991).

PBR Communications Systems, Inc. - Request for refund or reduction of fee for station WPBR, Palm Beach Florida - **Partial Refund Granted** (October 18, 1991).

Profile Broadcasting Company, Inc. - Request for refund of hearing fee for a new FM Station at Lisbon, New Hampshire - **Granted** (October 18, 1991).

Mono County Service Area No. 1 - Request for refund of filing fee with five low power television and television translator stations and renewal of three television translator licenses - **Granted** (October 18, 1991).

NEC Technologies, Inc. - Request for refund of filing fee - **Granted** (October 18, 1991).

Lake Geneva Broadcasting, Inc. - Request for refund of hearing fee for a new FM radion station at Lake Geneva, Wisconsin - **Granted** (October 18, 1991).

B. F. Dillingham - Request for hearing fee refund for a new FM station at Hilo, Hawaii - **Granted** (October 21, 1991).

Lucille S. Bill - Request for refund of filing fee for a new FM radio station at Blue Earth, Minnesota - **Granted** (October 21, 1991).

Gregory J. & Carol W. Siefker - Request for refund of hearing fee for a new FM radio station at Ashley, Michigan - **Granted** (October 21, 1991).

Morgan County Industries - Request for refund of hearing fee for a new FM station at West Liberty, Kentucky - **Denied** (October 21, 1991).

John Norman & Donald Lesko - Request for "Petition to Defer Fee" for a new FM station at Chiefland, Florida - **Dismissed at Moot** (October 21, 1991).

Garrison City Broadcasting, Inc. - Request for refund of hearing fee for a new FM Station at Somersworth, New Hampshire - **Denied** (October 21, 1991).

Julie J. Carey - Request for refund of hearing fee for a new FM station at Nashville, Indiana - **Denied** (October 21, 1991).

Melinda Boucher Read - Request for refund of filing fee for a new FM station at Spokane, Washington - **Granted** (October 21, 1991).

White Construction Co. - Request for refund of a hearing fee for a new FM station at Chiefland, Florida - **Granted** (October 22, 1991).

ET Communications, Inc. - Request for refund of a hearing fee for a new FM station at Opelika, Alabama - **Granted** (October 28, 1991).

B & H Broadcasting Company - Request for refund of filing fee for a new FM station at Gosnell, Arkansas - **Denied** (October 28, 1991).

Caddo Broadcasting Company - Request for refund of a hearing fee for a new FM broadcast station at Hot Springs Village, Arkansas **Granted** (October 28, 1991).

Andrew Bongirno - Request for a refund of filing fee for a renewal of a Second Class Radio Telephone Operator License - **Denied** (October 28, 1991).

Katieco, Inc. - Request for refund of hearing fee for a new FM station at Ellettsville, Indiana - **Denied** (October 28, 1991).

Hurricane Island Outward Bound School - Request for adjustment of fee re radiotelephone requirements - **Denied** (October 28, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON (202) 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-55

In the Matter of

Amendment of Section 73.202(b),	RM-6593
Table of Allotments,	RM-6715
FM Broadcast Stations.	RM-6760
(Bolingbroke, Unadilla and Warner Robbins, Georgia)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1991; Released: November 13, 1991

By the Chief, Policy and Rules Division:

1. The Commission has before it a *Petition for Reconsideration* filed by Rowland Albany Radio, Inc. ("Rowland"), of the *Report and Order*, 5 FCC Rcd 1603 (1990), which allotted Channel 278A to Unadilla, Georgia, Channel 271A to Bolingbroke, Georgia, and Channel 273A to Warner Robbins, Georgia. Rowland seeks reconsideration of the allotment of Channel 278A to Unadilla, suggesting the allotment of Channel 260A in lieu of Channel 278A.[1]

BACKGROUND

2. The Commission issued a *Notice of Proposed Rule Making*, 4 FCC Rcd 2175 (1989), proposing the allotment of Channel 273A to Warner Robbins, Georgia, as that community's second local FM service, at the request of Donald W. Earnhart. After adoption of the *Notice*, but before the comment date, William L. Taylor, Jr. submitted a petition seeking the allotment of Channel 273A to Bolingbroke, Georgia, as a first local service. We treated that request as a counterproposal. Gary Davidson filed a counterproposal seeking to allot Channel 273A to Unadilla, Georgia, as a first local service. Radio Mableton Limited filed reply comments suggesting the allotment of Channel 271A to Bolingbroke in lieu of Channel 273A. Because the three proposals were mutually exclusive, the Commission's staff conducted an engineering analysis to see if any alternate channels were available for allotment to the communities. We determined that Channel 278A could be allotted to Unadilla. This allotment, along with the allotment of Channel 271A to Bolingbroke, removed the need to perform a comparative analysis of the proposals.

3. After the period for filing comments and counterproposals in this proceeding expired, Rowland filed a petition for rule making proposing the substitution of Channel 278C3 for Channel 279A at Leesburg, Georgia, and modification of its construction permit for Station WIKX(FM) to specify operation on Channel 278C3. Rowland's petition was mutually exclusive with our proposed use of Channel 273A at Unadilla. As a result, Rowland's petition was not acted upon pending the outcome of this proceeding.

PETITION FOR RECONSIDERATION

4. Rowland contends that the Commission had before it in this proceeding proposals to allot Channel 273A, not Channel 278A, to Warner Robbins, Bolingbroke or Unadilla, Georgia. Rowland notes that the allotment of Channel 278A to Unadilla would not permit the allotment of Channel 278C3 to Leesburg, Georgia. Rowland states that it did not file comments earlier in this proceeding because the proposals, as filed, did not affect the operation or proposed change of its station. Rowland argues that the first time it realized that its request to upgrade Station WIKX(FM) was mutually exclusive with the Commission's allotment of Channel 278A to Unadilla, Georgia was upon review of the *Report and Order*. Rowland contends, therefore, that this petition for reconsideration represents the first opportunity for it to comment on the proceeding. In order to remove the conflict with its petition, Rowland proposes the allotment of Channel 260A in lieu of Channel 278A to Unadilla.

DISCUSSION

5. We deny Rowland's petition for reconsideration. The substitution of an alternate channel at Unadilla was made in accordance with Commission practice to perform an engineering analysis to see if any alternate channels are available when faced with mutually exclusive allotment proposals. Paragraph 3(c) of the Appendix to the *Notice of Proposed Rule Making* specifically alerts interested parties that the filing of a counterproposal may lead the Commission to allot a different channel than that which was originally proposed. Both the actual counterproposal advanced by a proponent and any alternate channel are within the scope of the notice; therefore, parties contemplating the filing of a petition for rule making that may conflict with an alternate channel must do so by the comment date in order to have their proposal considered as part of the proceeding. *See Pinewood, South Carolina*, 5 FCC Rcd 7609 (1990). Rowland filed its petition for rule making long after the record had closed in this proceeding. Therefore, we correctly allotted Channel 278A to Unadilla, even though the channel was in conflict with Rowland's later filed petition.

6. Rowland's request to allot Channel 260A as an alternate channel to Unadilla has been untimely submitted for consideration in this proceeding. As stated above, the possible allotment of an alternate channel at Unadilla was within the scope of the notice, but Rowland failed to file any comments in this proceeding until it filed this petition for reconsideration. However, since we have not acted upon Rowland's petition for the Leesburg upgrade, we will consider Rowland's request to allot Channel 260A to Unadilla in lieu of Channel 278A as an amendment to that petition. Therefore, we are issuing a *Notice of Proposed Rule Making* simultaneously with this *Order* seeking

[1] Public Notice was given on June 26, 1990, Report No. 1818.

comment on the substitution of Channel 278C3 for Channel 279A at Leesburg, Georgia, and the modification of Station WIKX(FM) to specify the higher class channel, and the substitution of Channel 260A for Channel 278A at Unadilla, Georgia.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration, filed by Rowland Albany Radio, Inc., IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-585

In the Matter of

Amendment of Section 73.202(b),	RM-7035
Table of Allotments,	RM-7320
FM Broadcast Stations.	
(Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 25, 1991; Released: October 25, 1991

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. This proceeding involves a proposal to change the community of license of a station authorized since 1946 to serve Anniston, Alabama. Anniston is a community of 29,523 people,[2] located at the center of an Urbanized Area of 75,614 persons. The station's new location, if the proposal were adopted, would be the rapidly growing Atlanta suburb of Sandy Springs, Georgia, a community of 46,877 located in an Urbanized Area of 1,613,357 persons. A number of licensees of Atlanta stations oppose the change. In addition, a wide range of licensees and citizens filed comments supporting and opposing the proposal.[3] After careful consideration of the comments, we believe the public interest would best be served by retaining the existing arrangement of allotments in the affected communities. We first provide a short description of the proposal, and resolve several procedural matters, before turning to substantive matters.

II. BACKGROUND/PRELIMINARY MATTERS

2. This proceeding began with a *Notice of Proposed Rule Making*, 4 FCC Rcd 8745 (1989) ("*Notice*"), issued in response to a petition for rule making filed by Steven D. King ("King"), which proposed to allot Channel 262A to Eatonton, Georgia. On the comment date, Mr. King withdrew his request, and Emerald Broadcasting of the South, Inc. ("Emerald"),[4] licensee of Station WHMA-FM, Channel 263C, Anniston, Alabama, filed a counterproposal[5] requesting that the Commission change the community of license of Channel 263C from Anniston to Sandy Springs, Georgia, downgrade the station to Channel 263C1, modify the license of Station WHMA-FM to specify the new community and channel, allot Channel 264A to Lineville, Alabama, and allot Channel 261C3 to Anniston.[6] Emerald states that it will apply for construction permits for the Anniston Class C3 and Lineville Class A channels, if allotted. [7]

3. Cook, licensee of Station WQRX-AM, Valley Head, Alabama, filed a counterproposal to allot Channel 261A to DeKalb County, Alabama. Cook's counterproposal is procedurally flawed because it was filed after the cut-off date for counterproposals in this proceeding. *See* Paragraph 3(a) of the Appendix to the *Notice* and Section 1.420(d) of the Commission's Rules. Furthermore, even if it had been timely filed, the counterproposal does not propose the allotment of the channel to a particular community, but rather to DeKalb County. The Commission allots channels to communities, not to counties. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88,101 (1982). Therefore, the counterproposal will be dismissed.

4. Jeanne Jeffcoat filed an expression of interest in the Eatonton allotment fifteen days after the deadline for initial comments. Jeffcoat argues that she relied on King to file an expression of interest, and was, surprised when he withdrew his proposal. Our policy in this regard is clear - parties are required to file expressions of interest in an allotment by the initial comment date, and any entity interested in applying for an allotment relies on the original petitioner to file an expression of interest at its own peril. *See Moscow, Ohio*, 5 FCC Rcd 927,928 (1990). *See also Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *aff'd*, 4 FCC Rcd 3412 (1989), *aff'd sub nom. Amor Family Broadcasting Group v. FCC*, 918 F. 2d 960 (D.C. Cir. 1990). Jeffcoat's expression of interest is untimely and will not be accepted. In the absence of a timely expression of interest, we will not allot a channel to Eatonton.

5. A number of parties filed supplemental comments addressing the merits of Emerald's timely-filed proposal. Although we generally do not accept such comments in allotment proceedings, we believe doing so in this limited instance is warranted. We note that Emerald submitted its

[1] The communities of Sandy Springs, Georgia, and Anniston and Lineville, Alabama, have been added to the caption.
[2] Unless otherwise indicated, population figures throughout this *Report and Order* are derived from the 1980 Census.
[3] Appendix 1 is a list of commenters.
[4] Emerald has since been renamed Sapphire Broadcasting, Inc. We use the name Emerald throughout this *Report and Order* to designate both Emerald and its successor, Sapphire.
[5] *See* Public Notice, Report No. 1811, March 19, 1990.
[6] The Sandy Springs, Lineville, and Class C3 Anniston allotments are all mutually exclusive with the existing Class C allotment at Anniston, and, therefore, the proposal may be considered pursuant to Section 1.420(i) of the Commission's Rules, which permits the modification of a station's community of license during the course of a rule making proceeding.
[7] Emerald also notes that its proposal requires the allotment of Channel 266A, in lieu of Channel 264A, to Hannahs Mill, Georgia, in MM Docket No. 89-547. Channel 266A has been allotted to Hannahs Mill. *See Hannahs Mill, Georgia*, 6 FCC Rcd 3753 (Allocations Br. 1991), *recon. pending*. The pending reconsideration request, if either granted or denied, would not materially affect any of the proposals in this proceeding.

counterproposal pursuant to Commission Rule 1.420(i), a rule adopted in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* ("*Community Modifications I*"), 4 FCC Rcd 4870 (1989), and that the standards governing such proposals have been clarified during the pendency of this proceeding. *See* 5 FCC Rcd 7094 (1990) ("*Community Modifications II*"). Because a number of the supplemental comments address the clarifications adopted in *Community Modification II*, we conclude there is good cause for the acceptance of supplemental comments and replies in this proceeding.

III. ISSUE ANALYSIS

6. The parties have raised four issues fundamental to this case. First, the parties question each other's motivations and candor. Opposing parties argue that the proposal should not be approved because Emerald is motivated solely by a desire for profit, while Emerald argues that the opposing parties are acting to forestall competition. We conclude that in this case the motivations of the parties are not relevant. Second, the opposing parties argue that the proposal violates our minimum spacing rules. We conclude that grant of the proposal would require a waiver of our spacing requirements, that the proposal presents some unique factors which might warrant a waiver, but that grant of the proposal would create a significant potential for new interference. Third, the opposing parties have argued that the public interest benefits of the proposal are not as great as claimed by Emerald, because the proposed station at Sandy Springs, while ostensibly representing a first local service, is in fact merely an additional local service to the Atlanta market. Consistent with precedent, we agree with the opposing parties, and conclude that Emerald's proposal should be considered as advancing only the lowest of our FM allotment priorities, "other public interest matters." Fourth, Emerald and the opposing parties submit conflicting arguments and evidence concerning the public interest benefits and detriments of the proposal. After considering a number of relevant factors, including gains in the population served, availability of other services, and disruption to existing service, we conclude that the gains in service provided that would result from grant of Emerald's proposal are substantially offset by the disruption in service to 400,000 listeners. We discuss more fully below the contentions of the parties and the basis for our conclusions, issue by issue.

7. *Motivations of the Parties/Lack of Candor.* The parties have raised a number of allegations concerning each other's motivations. These charges raise the general issue of whether such matters are relevant in allotment proceedings.

8. *Comments.* Generally, Emerald charges the opposing parties with seeking to foreclose competition that would be beneficial to the public, while the opposing parties charge that Emerald is motivated purely by a desire to exploit the Commission's processes for profit. Great American also charges that Emerald has acquired a number of stations, including WHMA, with the intent to seek their relocation, in violation of the Commission's anti-trafficking policies.[8] Great American also charges that Emerald failed to disclose or concealed its intent to seek relocation of WHMA when it acquired the station, in violation of Commission policy,[9] and that it misrepresented its intent when it stated in the application seeking assignment of the station that it would provide service to Anniston.

9. *Discussion/Resolution.* As a general matter, the motivations of the parties are not relevant in an allotment proceeding. We decline to engage in the sort of nebulous inquiry into licensees' motivations that would be necessary were we to consider such matters, especially since the critical issues with respect to the public interest are primarily technical and demographic. As we have found in related contexts, the public interest would be better served by an evaluation of parties' potential service contributions based on objective factors.[10]

10. With respect to Emerald's alleged concealment of or failure to disclose its intent to seek reallotment of WHMA to Sandy Springs, we conclude that Emerald fully complied with current Commission disclosure requirements. Emerald fully disclosed its plan to reallot WHMA in connection with its proposal in this proceeding. Because the filing of such a proposal is the *sine qua non* of "carrying forward" a planned station relocation,"[11] we conclude that any earlier disclosure of the mere fact that a licensee or proposed licensee may eventually pursue such a plan would serve no useful purpose.[12] Furthermore, Great American has pointed to no evidence, beyond the planning and filing of the instant proposal, that Emerald's representations in the WHMA assignment application with respect to service to Anniston were untruthful. Emerald has continued to serve Anniston throughout the planning and pendency of its proposal. Because we have long recognized that alternative spectrum use arrangements may serve the public interest,[13] we decline to adopt the approach urged by Great American, the effect of which would be to penalize Emerald merely for conceiving and advancing its proposal.

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[8] Great American cites *Edina Corp.*, 4 FCC 2d 36 (Rev. Bd. 1966), a case which relied on the Commission's then extant anti-trafficking policies as set forth in *Powell Crosley, Jr.*, 11 FCC 3 (1945), and *Applications for Voluntary Assignments or Transfers of Control*, 32 FCC 689 (1962).

[9] Great American cites *KFNF, Inc.*, 11 FCC 78 (1945) (*KFNF*), *Edina Corp., supra*, and *KFNF Broadcasting Corp.*, 7 FCC 2d 623 (Rev. Bd. 1967).

[10] *See, e.g., Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983)(abandoning policies designed to test whether applicants truly intend to serve a proposed community of license located adjacent to a larger city); *Elimination of the Three Year Rule and Underlying Anti-Trafficking Policy*, 52 RR 2d 1081 (1982). *See also Amendment of Section 73.3597*, 4 FCC Rcd 1710 (1989), *aff'd sub. nom. United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990).

[11] *See KFNF* at 88-89.

[12] We note that, unlike the situation in *KFNF*, there is no allegation in this case that an undisclosed option agreement concerning future ownership or control of the station exists. *See KFNF* at 88.

[13] *See KFNF* at 89.

11. *Short Spacing.* Section 73.207 of the Commission's Rules specifies minimum distances by which stations and allotments must be separated. The distances vary based on the class of station and the relative position of the stations on the spectrum. Emerald's proposed Sandy Springs station is short spaced to Station WSSL, Channel 263C, Gray Court, South Carolina. This short spacing would be eliminated, however, if Station WSSL were licensed pursuant to a construction permit[14] the Commission has granted to downgrade the station to channel 263C1. In addition, as a result of actions predating this proceeding, WHMA, a Class C station operating on Channel 263, is currently located at less than the required distance with respect to stations WVNA, Channel 262, Tuscumbia, Alabama, and WUSY, Channel 264, Cleveland, Tennessee. Emerald's proposal, if adopted, would remove any short spacing between WVNA and WHMA. It would also reduce the number of kilometers of short spacing between WHMA, if it were licensed to Sandy Springs, and WUSY.

12. *Comments.* Emerald argues that because its proposal would result in no new short spacings, and would in fact reduce existing short spacings, it complies fully with Commission requirements. Jacor, Great American, and S.S. Partners argue that Emerald's proposal is unacceptable, because substituting a new allotment that violates spacing requirements for a pre-existing allotment is contrary to the express terms of Section 73.207 of the Commissions Rules. The opposing parties cite *Front Royal, Virginia,* [15] in which the Commission rejected an allotment proposal, advanced in order to facilitate a change in a station's community of license, which would have resulted in the continuation of three existing short spacings. Jacor states that the Commission has always strictly adhered to minimum mileage separation requirements, and that such strict adherence is particularly important in this case, since in *Community Modifications I* we stated that under the new procedures allowing changes in community of license," the minimum distance [separation] rules would be the first line of defense to the improper clustering of stations around major metropolitan areas."[16]

13. S.S. Partners claim that a grant of the proposal would increase the number of people subject to interference between WHMA-FM and WUSY(FM). They claim that there are currently 2,525 persons within the 60 dBu contour of WHMA-FM subject to potential interference from the authorized facility of WUSY(FM), that this population would increase to 16,182 persons if Emerald's proposal were adopted, and that the population within the 60 dBu contour of WUSY(FM) subject to potential interference from WHMA-FM would increase from 1,995 persons to 17,204 persons. Emerald argues in response that grant of its proposal would greatly reduce the number of people with fewer than five full-time services receiving interference. Emerald also argues that the potential interference between the two stations would be less than that already examined by the Commission when it recently authorized facility changes for the two stations. Emerald argues that the Commission is bound by its determinations in connection with those authorizations, by the terms of an agreement between it and WUSY, and by the provisions of Section 73.213 of the rules. In the alternative, Emerald states that it is willing to operate its station in such a way as to maintain the current separation between the present 1 mV/m contours of WHMA and WUSY(FM).

14. *Discussion/Resolution.* Section 73.207 of the Commission's Rules provides, in pertinent part:

> FM allotments and assignments must be separated from other allotments and assignments... by not less than the minimum distances specified in... this section. The Commission will not accept petitions to amend the Table of Allotments,... or applications to change the channel or location of existing assignments unless transmitter sites meet the minimum distance separation requirements of this section .... However, applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separation requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency.[17]

Although Emerald's proposed amendment to the Table of Allotments for Sandy Springs was, on the day it was filed, short spaced to the only authorized transmitter site for Station WSSL at Gray Court, the licensee of the Gray Court station filed an application on the same day to eliminate the short spacing. The fully spaced site was not yet authorized, however, and, therefore, there arguably were not "transmitter sites" meeting minimum distance separation requirements.[18] The Commission has since granted the construction permit application, so that there is now an authorized transmitter site for the Gray Court station which meets spacing requirements to Emerald's proposal. Section 73.207 is silent as to the date by which there must be "transmitter sites" meeting distance separation requirements. Where, as here, the application that ultimately resulted in there being complying "transmitter sites" was filed on or before the date when the rule making request was first advanced, we see no reason the petition should be dismissed.[19]

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[14] *See* File No. BPH-900212IB.

[15] 10 RR 2d 1752 (1967).

[16] 4 FCC Rcd at 4873 (1989).

[17] 47 CFR § 73.207 (1990). We have since changed pertinent language of Section 73.207 to read:

> The Commission will not accept petitions to amend the Table of Allotments unless the reference points meet all of the minimum distance separation requirements of this section.

See Memorandum Opinion and Order in MM Docket 87-121, 6 FCC Rcd 5356 (1991). Because we conclude that under either version of the rule Emerald's proposal requires a waiver of our distance separation rules, this change is immaterial.

[18] *See* 47 CFR § 73.208(a) (Commission must first use transmitter sites, if authorized, to determine compliance with distance separation requirements by petitions to amend the Table of Allotments).

[19] Unlike an application, a petition for rule making contingent on the grant of an application is not prohibited by our rules. *Cf.* 47 CFR § 73.3517.

15. With respect to the short spacing between the Sandy Springs allotment and WUSY, Emerald's proposal is contrary to the express language of Section 73.207, in that there are simply no transmitter sites meeting distance separation requirements. This case differs, however, from a number of cases in which the Commission has refused to make a short spaced allotment. First, this case involves an allotment which is already short spaced to a relevant assignment.[20] Second, this case does not involve a proposal which would maintain the existing number of short spacings but exacerbate the existing degree of short spacing.[21] Third, this case does not involve a proposal to eliminate one short spacing by creating a different short spacing to a previously unaffected station.[22] Because the instant proposal would eliminate one short spacing altogether and reduce the number of kilometers involved in the only other present short spacing, we believe it appropriate to consider waiving strict application of Section 73.207 in the limited circumstances presented by this case. As a general matter we wish to encourage proposals that would eliminate or reduce existing short spacings, and we believe that refusal to further consider a waiver under these circumstances could frustrate the underlying purpose of the rule.

16. However, unlike the application context, in the allotment context our inquiry does not end once it is shown that no new short spacings would be created, and no existing short spacings exacerbated.[23] Allotment proposals may involve changes in station class or channel, and these changes may be such that the mere fact that the number of kilometers of short spacing between two stations would stay the same or be slightly reduced is unavailing, because the potential for interference between the two stations would be increased. Our case law recognizes this principle. In *Livingston, Texas,* [24] we held that the grandfathering provisions for existing short-spaced stations do not provide for maintaining a short spacing after a rule making proceeding changes a particular channel allotment. We also examined whether, if such a short spacing were maintained, the interfering contours of either station involved in the arrangement might extend closer to the other station, thereby creating greater potential for interference. We believe the analytical framework set forth in *Livingston* is particularly appropriate in this case,[25] given the fact that the areas of potential interference under the present allotment plan and the proposed allotment plan are widely separated geographically. Indeed, while allowing grandfathered stations to increase facilities has historically been an acceptable practice in part because the increased levels of interference resulting are likely to represent only marginal decreases in signal quality in areas already experiencing interference, in this instance the new interference areas would be constituted entirely of areas geographically removed from the present interference areas. Listeners in the new interference areas would experience a sudden and sharp decrease in signal quality, rather than a marginal attenuation. As we indicated in *Community Modifications II,* the continuation of existing service is a significant factor that must be weighed in the public interest balance. For these reasons, Emerald's proposal to maintain the present separation between the two stations' 60 dBu contours, while it may reduce slightly the negative effects resulting from grant of its proposal, does not fully address core allotment concerns.

17. Our analysis indicates that, with respect to the current short spacing between WHMA at Anniston and first adjacent station WVNA at Tuscumbia, there is currently no overlap between the stations' predicted 60 dBu and 54 dBu contours. Therefore, elimination of the short spacing to the Tuscumbia station would not significantly decrease the potential for interference within the contours we have in a number of contexts deemed relevant for service calculations.[26] With respect to the short spacing between WHMA and first adjacent station WUSY, the evidence submitted and staff analysis indicate that both the area and population within the overlap between the stations' 60 dBu and 54 dBu contours would increase were WHMA to move to Sandy Springs. The evidence submitted indicates that the population potentially subject to interference could increase by as much as 27,399 persons.[27] Emerald's own study estimates an increase in the number of persons subject to interference of 18,662 persons (from 8,355 to 27,017).[28] This is, we believe, a signifi-

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[20] *Compare Chester and Wedgefield, South Carolina,* 4 FCC Rcd 4503 (Pol. and Rules Div. 1989)(denying a request to upgrade the Class of a station when the upgraded station would be short spaced), *aff'd,* 5 FCC Rcd 5572 (1990); *Portland, Tennessee,* 35 FCC 2d 601 (1972)(denying a proposal to allot a fully spaced first local service where allotment of the channel requires substitution of a short-spaced channel for a previously fully spaced channel); *Millington, Maryland,* 45 RR 2d 1689 (Broadcast Bureau 1979)(declining to waive distance separation requirements and allot an FM station). *Millington* is relevant, however, in that we held in that case that acquiescence by a station that would be short spaced to the new allotment is not decisive," because the residents of the affected area are the real beneficiaries of our mileage separation system of protection." *Id.* at 1691.

[21] *See Front Royal, supra* n. 14.

[22] *Compare Canton, Georgia,* 3 FCC Rcd 737 (Policy and Rules Div. 1988); *Chicago, Illinois,* 53 FCC 2d 1142 (1975); *Toms River, New Jersey,* 43 FCC 2d 414 (1973).

[23] *See* 47 CFR § 73.207.

[24] 3 FCC Rcd 2179 (Policy and Rules Div. 1988).

[25] A later case, *Vero Beach, Florida,* granted a proposal to upgrade a station's allotment where an existing short spacing would have been reduced from 2.8 to 2.3 kilometers, and no new short spacings would be created. *See* 3 FCC Rcd 6152 (Policy and Rules Div. 1988). The decision document does not indicate whether the staff considered the potential for greater interference potentially created by its action. Because we believe that *Livingston* sets forth a prudent analytical framework, *Vero Beach* is hereby expressly overruled to the extent it stands for the proposition that the staff may, in the circumstances presented in the *Vero Beach/Livingston* line of cases, grant an allotment proposal involving a waiver of the minimum distance separation requirements without analyzing the effect of the proposal on relevant interfering and protected contours.

[26] *Greenup, Kentucky,* 4 FCC Rcd 3843 (1989), *aff'd in pertinent part,* 6 FCC Rcd 1493 (1991), *appeal pending sub. nom. WATH, Inc. v. FCC,* Case No. 91-1198 (filed May 2, 1991). *Greenup* held that, for purposes of service area calculations, the 60 dBu contour is the relevant contour. *Greenup* also specified that, in predicting a station's service area, we would generally assume use of maximum facilities for the station. We carved out one exception relevant in this case, however, for Class C stations, for which we calculate service contours based on the greater of minimum or actual facilities.

[27] *See* Reply Comments of S.S. Partners, Engineering Exhibit, Figures 1 and 2.

[28] *See* Emerald's Supplemental Comments of May 14, 1990, Exhibit 1, Figure 10.

cant negative factor weighing strongly against the grant of a waiver. Although we recognize that this increase in interference potential is offset somewhat by the fact that Emerald's proposal would shift the area of interference from one enjoying fewer radio services to an area enjoying more radio services, the potential benefit is not sufficient to outweigh the overall negative consequences to our allotment plan of allowing allotment changes that would significantly increase the potential for interference.

18. We specifically reject Emerald's contention that previous determinations with respect to short spacing between WUSY and WHMA as an Anniston station foreclose any further analysis in this case. First, while we may have considered in connection with their recently granted station modifications the potential for increased interference if the two stations were to increase to maximum facilities, the specific authorizations granted were limited to the particular proposals, seeking less than maximum facilities, then before us. Furthermore, given the inherent difficulties in constructing maximum class C facilities,[29] we think it particularly inappropriate in the allotment context to compare potential interference between WUSY and WHMA at Sandy Springs with the purely hypothetical potential interference between assumed maximum facility Class C stations at Cleveland and Anniston.

19. Generally, waivers of our spacing rules will not be granted absent a showing of compelling need for the requested allotment changes. Although this case presents some unique factors, among them being that the proposal could reduce or eliminate some short spacings, without creating short spacing to a previously unaffected station, we conclude that these factors are not sufficient by themselves to warrant a waiver. Indeed, the potential for increased interference that would be created by grant of the instant proposal presents a significant public interest detriment. In order to insure full consideration of the proposal, however, we examine the public interest benefits that would accrue from a grant, in order to determine if those benefits might prove sufficiently compelling to outweigh the interference detriments from the proposal.

20. *Huntington/Tuck/KFRC Analysis.* The Commission weighs the public interest benefits from FM allotment proposals in light of its FM allotment priorities. The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88, 92 (1982). In this case, the first two allotment priorities are not implicated. [30] With respect to priority three, Sandy Springs is the only community which would stand to gain a first local service, and no community would lose its only local service. Generally, provision of a first local service is a factor that would weigh heavily in favor of a proposal. In this instance, however, Sandy Springs is located within the Atlanta Urbanized Area, raising the question under Commission policy as to whether a first local service preference is warranted, in light of the fact that Atlanta has substantially more than one local service. [31]

21. *Comments.* The NAB, CapCities/ABC, Jacor, and SS Partners argue that adoption of Emerald's counterproposal would not provide a first local service to Sandy Springs, but would instead constitute merely an additional service to Atlanta and surrounding areas. ABC argues that Sandy Springs, located directly adjacent to Atlanta, is a classic example of a suburban community that cannot be separated from its larger parent community for allotment purposes. In support of its argument, ABC submits evidence that Sandy Springs does not provide municipal services such as water, sewer, school and public transportation services, but instead relies on services provided by Atlanta and Fulton County, Georgia. ABC also references a newspaper article reporting that the mayor of Atlanta has proposed to formally annex part of Sandy Springs.

22. Emerald argues that Sandy Springs is a community in need of a first local service. It submits a substantial amount of evidence concerning the economic, political, and cultural attributes of Sandy Springs. Among other things, it notes that Sandy Springs has 24 churches, 16 shopping centers, offices, a Chamber of Commerce, and dozens of civic organizations. Emerald claims that the 1990 Census population of Sandy Springs is growing rapidly; its estimated 1990 population will be approximately 70,000 persons. Emerald includes declarations from local political and business leaders as evidence that Sandy Springs residents are strongly interested in having an FM radio station allotted to their community. Emerald also submits evidence concerning efforts by Sandy Springs political leaders to incorporate the community. Emerald acknowledges that Sandy Springs and Atlanta are part of the same advertising market, but argues that one reason for this is that Sandy Springs has never had its own broadcast outlet.

23. *Discussion/Resolution.* Our case law sets forth three factors relevant to whether a proposal to serve a suburban community should receive a first local service preference: 1) signal population coverage, *i.e.,* the degree to which the proposed station is technically capable of providing service to both the suburban community and the larger metropolis; 2) the size and proximity of the suburban community relative to the metropolis; and 3) the interdependence of the suburban community with the metropolis, as gauged by a number of indicia.[32] We believe that all three factors indicate that Sandy Springs should not be awarded a first local service preference.

24. With respect to signal population coverage, Emerald proposes to locate the antenna for its wide coverage area Class C1 station in the city of Atlanta. Therefore, Emerald has an extremely weak case under this factor for the award of a first local service preference.

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[29] *See Greenup,* 6 FCC Rcd at 1497, n. 7.

[30] The evidence indicates that, although station WHMA presently provides some first and second aural service to areas in the vicinity of Anniston, the Anniston Class C3 and Lineville allotments will replace any first or second aural service lost by the Anniston to Sandy Springs reallotment. *But see, infra,* 31.

[31] *See Community Modifications II,* 5 FCC Rcd at 7096; *RKO General (KFRC),* 5 FCC Rcd 3222 (1990)*Faye and Richard Tuck,* 3 FCC Rcd 5374 (1988) ("*Tuck*"); and *Huntington Broadcasting Co. v. FCC,* 192 F. 2d 33 (D.C. Cir. 1951).

[32] *See Community Modifications II,* 5 FCC Rcd at n. 14 (1990).

25. The same is also true with respect to the second factor, size and proximity. Sandy Springs is directly adjacent to Atlanta. Under the most favorable assumptions, Sandy Springs is approximately one sixth the size of Atlanta in population.

26. With respect to the third factor, interdependence, while the evidence submitted by Emerald clearly establishes that Sandy Springs is a community, we do not believe the mere fact that there are some economic, political, and cultural organizations that identify themselves with Sandy Springs establishes that Sandy Springs is sufficiently independent from Atlanta to warrant the grant of a first local service preference. In fact, given the intensity and diversity of human activity in urbanized areas, it is commonplace that organizations emerge that identify themselves with some geographic component of the urbanized area, such as a neighborhood, subdivision, or political district. The test here is not whether such institutions exist, but what they indicate about the relationship between the suburb and the metropolis. We think only a few facts need be culled from the record to persuasively demonstrate the interdependence of Sandy Springs with Atlanta: 1) The Sandy Springs Chamber of Commerce lists the address where it is located interchangeably as Atlanta and Sandy Springs, lists many of the public buildings and civic organizations in its community directory at Atlanta addresses, and lists virtually all its members at Atlanta addresses;[33] 2) A Georgia Power Company profile of the Atlanta office market describes Sandy Springs as part of the North Central suburbs, and describes this area as "Atlanta's second downtown";[34] 3) Sandy Springs is unincorporated, and, therefore, has no municipal government; 4) Sandy Springs receives all government services either from the city of Atlanta, from Fulton County, the county in which Atlanta is located, or from metropolitan area authorities. Furthermore, while as yet unsuccessful efforts to incorporate Sandy Springs may ultimately result in more indicia of independence, we are unable to conclude given the present facts that Sandy Springs is sufficiently independent of Atlanta to warrant a first local service preference. Indeed, it appears that one of the major concerns foreclosing incorporation of Sandy Springs may be the potential impact on the city of Atlanta.[35]

27. Given our conclusions with respect to the three relevant factors, it is clear that Emerald's proposal for Sandy Springs should not be awarded a first local service preference. Accordingly, we turn next to an evaluation of the proposal under the fourth of our FM allotment priorities, other public interest matters.

28. *Other Public Interest Matters/Value of Existing Service.* Under our fourth allotment priority, other public interest matters, we compare competing proposals on the basis of factors such as population served and availability of other services. In this case, the "competing proposals" are 1) the retention of the existing arrangement of allotments (a Class C allotment at Anniston), or 2) the adoption of Emerald's proposed new arrangement of allotments (a Class C3 allotment at Anniston, a Class C1 allotment at Sandy Springs, and a Class A allotment at Lineville). In such cases, we analyze the proposals first to see whether, if treated as competing requests for new allotments, the new arrangement would be preferred. If the new arrangement would be preferred, we then examine whether disruption of existing service would outweigh the theoretical gains from the change.[36]

29. *Comments.* Several of the parties submit evidence concerning the areas and populations that would be affected by grant of Emerald's proposal. Although the precise figures differ somewhat, the comments generally reflect that the Sandy Springs allotment would bring new service to approximately 2.2 million people, and the Lineville allotment would serve approximately 30,000 people. These gains would be purchased at a cost, however. The comments generally reflect that a Class C3 allotment at Anniston would serve approximately 410,000 people fewer than a Class C allotment at Anniston.

30. Emerald argues that this net gain in population served of approximately 1.8 million justifies an overwhelming preference in favor of the new arrangement of allotments. A number of parties disagree, arguing that specific areas and populations that would receive new service at Sandy Springs already receive a large number of services from Atlanta area stations, whereas the specific areas and populations that would lose service from WHMA generally receive considerably fewer services. In response, Emerald argues that, even taking into account differences in the number of services available, its proposal is overwhelmingly preferable to the existing arrangement of allotments. In support of this proposition, Emerald submits engineering comparing the "service value" of adopting its proposal to the "service value" of the existing arrangement of allotments, using the standards the Commission developed in *Greenup*. Briefly stated, *Greenup* provides a methodology for comparing competing allotment proposals by adjusting raw population totals to take into account differences in the number of services those populations receive.[37] Emerald's study shows that the "gain area" from its proposal has a service value index of 155,582, whereas the "gain area" service value from retention of a class C allotment at Anniston would be 55,475.[38]

31. Emerald also argues that "the current far-reaching Class C signal of WHMA is largely wasted from a listenership standpoint," noting that in four Birmingham metropolitan area counties toward the outer edge of WHMA(FM)'s service area, the station's total market share is 0.6 percent. Emerald argues that Anniston's population will never expand to justify a full Class C station, noting that the community's population has not grown significantly since 1940, whereas Sandy Springs's population, at current growth rates, will be approximately 100,000 by the year 2000. Emerald also argues that, in comparison to markets of similar size, Atlanta has, by a number of measures, substantially fewer available radio signals. Emerald notes that Atlanta/Sandy Springs has far

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[33] *See* Emerald's Supplemental Comments of May 14, 1990, Exhibit 7.

[34] *See* Reply Comments of CapCities/ABC, Exhibit 2.

[35] *See Tussles Mar Effort to Push Incorporation,* Atlanta Constitution, March 22, 1990, at H01, submitted in Emerald's Supplemental Comments of May 14, 1990, Exhibit 5.

[36] *See Community Modifications II,* 5 FCC Rcd at 7097.

[37] *See* 6 FCC Rcd at 1495.

[38] *See* Emerald's Supplemental Comments, filed March 28, 1991, Exhibit 1, Figure 18.

more residents per aural service than Anniston. It submits evidence showing that Anniston has 7,381 residents per full time station licensed to the community, whereas Atlanta has 30,359 residents per full time station. It submits evidence that, if service is defined as full-time stations licensed to the community or providing city grade service to the community and Urbanized Area, Anniston has 12,602 residents per aural service, whereas Atlanta has 100,835 residents per aural service. Emerald also notes, and several commenting parties agree, that its proposal would provide opportunities for members of minority groups to seek authorizations for the new stations at Anniston and Lineville.

32. With respect to the disruption of existing services, Jacor and Great American claim that the deletion of Channel 263C at Anniston would create "white" and "gray" areas. According to Great American's engineering statement, twenty-eight persons in a four square kilometer area would lose their only aural service and 692 persons in a 106 square kilometer gray area would be left with only one service. Great American concedes that the allotment of Channel 264A to Lineville and the retention of Channel 261C3 at Anniston would provide service to these otherwise white and gray areas, but argues that a substantial amount of time could elapse until new licensees are selected for the Lineville and Anniston Channel 261C3, and during that time service to the "white" and "grey" areas would be disrupted. Similarly, S.S. Partners argues that Anniston will be deprived of an FM station for the time period that it will take to authorize a licensee to operate on the new Class C3 Channel. In response, Emerald commits to continue WHMA's service to Anniston and surrounding areas, and delay the commencement of operations at Sandy Springs, until the eventual permittee of the Anniston Channel 263C3 allotment begins operations.

33. *Discussion/Resolution.* We turn first to the question of whether, when considered as if they were competing proposals for new or upgraded allotments, we would prefer the existing arrangement of allotments or the new arrangement of allotments. Regardless of the outcome, Anniston would retain a Class C3 allotment. Accordingly, the appropriate comparison is between a proposal to upgrade the Anniston station from C3 to C, or, alternatively, to add a C1 allotment to Sandy Springs and an A allotment to Lineville.[39] When considered in this manner, the two most critical factors are the populations and services available within the gain areas of the upgrade and allotments.[40] Emerald's forth in *Greenup,* leads us to conclude that, were the competing proposals before us solely for new, fully spaced service, we would prefer the arrangement that adds two new allotments. The service value index for the "gain area" of that proposal substantially exceeds that for the "gain area" of the "upgrade", and is well in excess of the difference we found dispositive in *Greenup.* In addition, the two new allotments at Lineville and Anniston could potentially result in opportunities for station ownership by members of minority groups.

34. While Emerald's proposal might result in a superior arrangement of new allotments, there is, however, an important qualitative element of the proposal, the disruption to existing service, which counterbalances this consideration. "That ... curtailment of service is not in the public interest is axiomatic. Whether or not it may be off-set by concomitant factors is something the Commission should consider." *Hall v. FCC,* 237 F.2d 567 (1956). In *Community Modifications II,* the Commission specifically addressed this issue. The Commission stated:

> The public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallotting of a channel from one community to another....

5 FCC Rcd at 7097. Moreover, the weight to be accorded the public's expectation is substantial. As the Commission indicated in *Pillar of Fire,* 62 RR 2d 276 (1987), we should not allow a mechanistic application of Section 307(b) of the Communications Act to automatically override our concerns with disruption to existing service.

35. Even assuming that service from the Lineville and Anniston Class C3 allotments would commence simultaneously or nearly simultaneously with the cessation of Class C operations from Anniston, approximately four hundred thousand individuals, over a widely spread geographic area, would lose service. These individuals would be precisely the type of persons the Commission expressed concern about in *Community Modifications II,* since the net result of any action granting Emerald's proposal would be that a substantial population, with a legitimate expectation of continued service, would suddenly find that they no longer have access to "the signal of an operating station that can be accessed today simply by turning on a... radio set."[41] The approximately 400,000 individuals in

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[39] Since the downgrade of Station WSSL appears to be a necessary and integral element of Emerald's proposal, we note that the "upgrade" of the Station WSSL at Gray Court from a Class C1 to Class C station should be considered as a benefit of retaining the present arrangement of allotments. Our analysis indicates that the "gain area" for station WSSL contains approximately 41,429 person. This "gain area" more than offsets, in raw population, the "gain area" resulting from the Lineville allotment. We decline to consider, however, the "gain area" from several allotments that Emerald asserts would be made possible by grant of its proposal, since we have no timely expressions of interest for such allotments before us. *See* supra, 4.

[40] Because the outcome of this proceeding would have no effect whatsoever with respect to the number of services received in Anniston, because the parties submitted data concerning the entire service areas of the allotments involved, and because this case involves loss of service in areas outside the particular communities involved, we do not limit our analysis to the population sizes of and services available within the proposed communities of license. *Compare Lenoir and Blowing Rock, North Carolina,* 4 FCC Rcd 2642 (All. Br. 1989). Accordingly, we will not further consider Emerald's showings with respect to the ratios of population in the respective communities to the number of services received. We also reject any effort to "discount" the value of the Anniston Class C "gain area" due to WHMA's low ratings in that area, because ratings provide no reliable basis for comparison of existing and new service, and, in any event, ratings would appear to be directly relevant to the types of programming considerations we have generally deemed irrelevant in specific allotment proceedings. *See Atlanta, Georgia,* 49 FCC 2d 1270 (1974), *recon. denied,* 55 FCC 2d 62 (1975).

[41] 5 FCC Rcd at 7097.

question would not even be offered the "poor substitute" of a vacant allotment capable of providing service at some future date. This population is substantial, in both absolute numbers and relative to the proposed gains. Therefore, we conclude that the disruption to existing service that would be caused by grant of Emerald's proposal substantially offsets the purported gains.

IV. CONCLUSION

36. After considering fully Emerald's proposal, we conclude that a waiver of our minimum mileage separation requirements would not serve the public interest. The waiver, while eliminating one short spacing and reducing another, could create significant additional radio interference for populations and in geographical areas not currently experiencing interference. Furthermore, this negative effect of the waiver would not be sufficiently offset by the public interest benefits of the proposal. The proposal would not advance any of the first three of our allotment priorities, and although it might provide some net benefits under our fourth allotment priority, other public interest matters, the magnitude of those benefits is substantially reduced by the disruption in service that would be caused to a substantial population and area.

37. Accordingly, IT IS ORDERED, That the Counterproposal filed by Emerald Broadcasting Co. IS DENIED.

38. IT IS FURTHER ORDERED, That the Petition for Rule Making filed by Steven D. King and the Counterproposal filed by Cook Communications ARE DISMISSED.

39. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

40. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202)634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX 1: COMMENTING PARTIES

Comments

1. Steven D. King
2. Emerald Broadcasting of the South, Inc. (Emerald)

Reply Comments

1. Jeanne Jeffcoat (Jeffcoat)

Comments in Response to the Counterproposal

1. National Association of Broadcasters (NAB)
2. Capital Cities/ABC, Inc. (Cap Cities)
3. Jeffcoat
4. Emerald
5. Jacor Broadcasting of Atlanta, Inc. (Jacor)
6. S.S. Partners
7. Great American Television and Radio Co., Summit-Atlanta Broadcasting Corporation, and WSB, Inc.
8. Edens Broadcasting, Inc. (Edens)

Other Formal Filings

1. Summit-Atlanta Broadcasting Corporation and WSB, Inc.
2. Emerald
3. Board of Directors of the Georgia Association of Broadcasters (GAB)
4. Jacor
5. Great American Television and Radio Co. (Great American)
6. Cook Communication, Inc. (Cook)
7. Frances J. DiPietro
8. Robert A. Perry
9. Metro Birmingham Branch of the NAACP
10. Lineville Community Leaders
11. Anniston Community Leaders
12. Anniston Minority Citizens
13. Capstar Communications of South Carolina, Inc.

Informal Filings

1. Alan R. Linn
2. Ken Pauli
3. Calhoun County Chamber of Commerce
4. Nancy and Robert Price -- Support Alabama 100 Petition

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE TELEVISION TECHNICAL AND OPERATIONAL REQUIREMENTS — MM Docket No. 91-169

REVIEW OF THE TECHNICAL AND OPERATIONAL REQUIREMENTS OF PART 76, CABLE TELEVISION — MM Docket No. 85-38

ORDER GRANTING EXTENSION OF TIME

Adopted: October 25, 1991; Released: October 25, 1991

By the Chief, Mass Media Bureau:

1. On June 27, 1991, the Commission released a *Notice of Proposed Rule Making*, 6 FCC Rcd 3673, 56 FR 30726 (1991), seeking comments on proposed cable television technical regulations. The *Notice* stated that interested parties could file comments on or before September 17, 1991, and reply comments on or before October 17, 1991. Several interested parties have filed comments and reply comments on or before the specified dates. Among the reply comments filed is a negotiated agreement on technical standards by the National League of Cities, the United States Conference of Mayors, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, the National Cable Television Association, and the Community Antenna Television Association ["the parties"].

2. In adopting the *Notice*, the Commission reiterated its belief that the completion of negotiation among the parties would contribute greatly to fashioning effective cable technical standards. *See Notice* at 3674, n. 6. We noted subsequently, too, that should the parties conclude and submit an agreement within the time contemplated for receipt of reply comments, we could extend the reply comment period to allow all interested persons an opportunity to comment on such an agreement. *See Order in MM Docket Nos. 91-169 and 85-38*, DA 91-1167 (released September 17, 1991). We believe that granting a limited extension of time to file further reply comments on the parties' agreement would serve the public interest and our goals of fashioning effective cable technical standards and avoiding inordinate delay toward this end. Parties are particularly invited to comment on those aspects of the agreement that were not specifically focused on in the *Notice*, e.g. phased in compliance schedule, closed captioning carriage, audio signal levels, and direct pickup interference, and on whether these matters should be within the scope of this proceeding.

3. Accordingly, IT IS ORDERED, That, pursuant to authority delegated by §0.283 of the Commission's Rules, the time for filing comments in response to the subject agreement IS EXTENDED to November 15, 1991.

4. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Mass Media Bureau, (202) 632-7480 [legal issues], or John Wong, Cable Television Branch, Mass Media Bureau, (202) 254-3420 [technical issues].

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Richard M. Firestone
Chief, Common Carrier Bureau

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with Open Network
Architecture Access Tariffs

Motion for Extension of Time

ORDER

Adopted: October 23, 1991; Released: October 24, 1991

By the Chief, Common Carrier Bureau:

1. On September 19, 1991, the Common Carrier Bureau (Bureau) released an Order (*TRP Order)* [1] specifying cost support material to be supplied in conjunction with Open Network Architecture (ONA) tariffs. Ameritech Operating Companies (Ameritech) on September 27, 1991 filed a petition for waiver of the *TRP Order* stating that the companies could not disclose the Switching Cost Information System (SCIS) computer model because they do not own the model and lack the right to disclose it; the model is the valuable intellectual property of Bell Communications Research, Inc. (Bellcore); that placing it on the public record would constitute an unconstitutional taking of Bellcore's property; and the model incorporates proprietary data supplied by switch manufacturers that the companies cannot disclose without prior authorization.

2. On October 18, 1991, the Bureau released an Order (*SCIS Waiver Order)*[2] addressing Ameritech's petition for waiver. That Order required Ameritech to submit the SCIS model and documentation for a preliminary, *in camera* review.

3. On October 23, 1991, Ameritech filed a motion for extension of time to obtain a limited amount of additional time to comply with the terms of the *SCIS Waiver Order.* Ameritech states that the process of negotiating terms of releases with switch vendors that supply data for the SCIS model has proven more complex and time consuming than expected.

4. The Bureau has reviewed Ameritech's request for extension of time and have determined that good cause has been shown to grant Ameritech additional time until Monday, October 28, 1991, in which to comply with the *SCIS Waiver Order.*

5. IT IS THEREFORE ORDERED, that the Ameritech Operating Companies' petition for waiver IS GRANTED, to the extent specified herein.

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[1] Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, DA 91-1169, rel. Sept. 19, 1991 (*TRP Order).*

[2] Cost Support Material To Be Filed with Open Network Architecture Access Tariff, DA 91-1309, rel. Oct. 18, 1991 (*SCIS Waiver Order).*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. (NECA) — Transmittal No. 459

Tariff F.C.C. No. 5

ORDER

Adopted: October 25, 1991; Released: October 25, 1991

By the Chief, Common Carrier Bureau:

1. The National Exchange Carrier Association, Inc. (NECA) filed Transmittal No. 459 on July 30, 1991, to introduce terms and conditions for separate charges applicable to interexchange carriers (IXCs) that submit unauthorized Primary Interexchange Carrier (PIC) changes to participating NECA telephone companies. Transmittal 459 is scheduled to become effective on October 28, 1991.

2. On August 14, 1991, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 459. NECA replied to MCI's petition on August 26, 1991.

3. MCI argues that NECA failed to include sufficient cost support to justify its charges as required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38(b). MCI Petition at 2. MCI claims that because NECA has only provided aggregate results of its survey of member companies' costs and forecasts of unauthorized PIC changes, it is not possible to determine whether the companies responded correctly. Neither, claims MCI, does NECA provide any information to enable the Commission to determine the accuracy of NECA's demand projections. MCI then argues that NECA failed to provide the Commission and ratepayers with any assurances that NECA audited the local exchange carrier (LEC) data it received. MCI therefore requests that the Commission require NECA to submit cost information for each member company. *Id.* at 3. Finally, MCI claims that NECA's transmittal is unduly restrictive and, also, that NECA should revise its transmittal to reflect the tentative conclusions relating to unauthorized PIC changes drawn in the Commission's *PIC Change NPRM*. *Id.* at 4-5.[1]

4. NECA replies that its cost support data justify the unauthorized PIC change charges. It claims that, as required by Section 61.38(b) of the Commission's rules, each member company developed revenue requirements and demand projections for a 12-month projection of costs. These demand forecasts, says NECA, are based on analyses of historical unauthorized PIC change data. NECA Reply at 2-3. NECA then submits that it thoroughly reviewed each member's submission for consistency and for cost deviation between companies of similar size. As a result of these audits, says NECA, data corrections were made by several members. *Id.* at 3. NECA therefore sees no need to submit individual company cost studies as part of its filing. Such individual cost studies, says NECA, are not only unnecessary to the instant transmittal but would impose unnecessary administrative burdens on NECA and its member companies. *Id.* at 3-4.[2]

5. The Common Carrier Bureau has reviewed the NECA transmittal as revised, and all associated submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate NECA Tariff F.C.C. No. 5, Transmittal No. 459, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] *Citing* American Telephone and Telegraph Company, Petition for Rulemaking, CC Docket No. 91-64, RM 7245, Notice of Proposed Rulemaking, 6 FCC Rcd 1689 (1991) (*PIC Change NPRM*).

[2] On September 20 and September 25, 1991, NECA provided additional cost information to support its charges. In addition, on October 7, 1991, at the Bureau's request, NECA filed Transmittal No. 468 to replace the terms "end user" and "pay telephone agent" with the term "billed party."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3322

Tariff F.C.C. No. 2

ORDER

Adopted: October 25, 1991; Released: October 25, 1991

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) filed Transmittal 3322 to introduce its "800 Guaranteed Nodal Validator" which provides a term plan discount for the service when the customer commits to a three-year term and a net annual revenue usage commitment of $5.5 million. MCI Telecommunications Corporation (MCI) filed a petition against this transmittal seeking its rejection or suspension and investigation.[1]

2. MCI asserts that AT&T's offering is merely a scheme to "lock-in" 800 customers to "long term commitments," and is another form of leveraging of its market power in the 800 market. MCI argues that this tactic is an attempt to keep customers after 800 number portability is available. MCI Petition at 2. It indicates that customers subscribing to this three-year term offering would not be able to migrate their inbound calling business (with their 800 telephone numbers) until well after the advent of number portability. *Id.* at 2-3. MCI also cites the *GTE Airphone* case,[2] which addresses the reasonableness of long-term service obligations imposed on customers in non-competitive markets that become potentially competitive. *Id.* at 3-5.

3. Finally, MCI asks that AT&T be directed to delete from its Tariff F.C.C. No. 2 all financial penalties associated with its customers' early termination of their AT&T 800 services, if they decide to obtain their inbound calling capability from an AT&T competitor when 800 number portability becomes a reality. *Id.* at 6.

4. AT&T responds that its term plan is no more suspect than MCI's term plans. AT&T Reply at 2. AT&T says that the lack of number portability affects all participants in the 800 service market, including AT&T. Thus, AT&T concludes that the lack of number portability does not provide any one carrier with a competitive advantage. *Id.* at 4.

5. Concerning MCI's "leveraging" claims, AT&T asserts that MCI has failed to meet the showing required by case law. Further, AT&T states that, since its competitors already provide 800 term plans, AT&T's offering is an "ordinary marketing method available to all in the market" and thus not an abuse of its position. *Id.*[3]

6. AT&T argues that MCI's "lock-in" claim is without merit, primarily because the plan is optional and because subscribers to the plan may, in accordance with its terms, discontinue the plan at any time. *Id.* at 4-5.

7. Concerning MCI's contention that financial penalties should be deleted from the Tariff, AT&T notes that customers benefit from discounted rates under the offered plan. If the customer wishes to leave AT&T, the customer is free to do so by paying the charges it voluntarily agrees to pay. *Id.* at 5. Accordingly, AT&T urges denial of MCI's petition.

8. The Common Carrier Bureau has reviewed AT&T Transmittal 3322 and related pleadings. We concluded that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 3322, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] MCI Petition To Reject or Alternatively Suspend and Investigate, filed August 13, 1991. AT&T filed a reply to this petition on August 23, 1991.

[2] Amendment of the Commission's Rules Relative to the Allocation of the 849-851/894-896 MHz Bands, Gen. Docket No. 88-96, Memorandum Opinion and Order, FCC 91-194, 6 FCC Rcd 4582 (1991).

[3] *Citing*, Telex Corp. v. IBM, 510 F.2d 894, 926 (10th Cir. 1975), *cert. denied*, 423 U.S. 802 (1975); Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with Open Network
Architecture Access Tariffs

ERRATUM

Released: October 28, 1991

By the Chief, Common Carrier Bureau:

On October 18, 1991, the Common Carrier Bureau released an Order, DA 91-1309, in the above-captioned proceeding. This erratum corrects sentence four of paragraph one of that Order to read as follows:

> Comments on Ameritech's petition were submitted by American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom).[4]

2. In addition, Page 2 of Chart NEUT-1 was inadvertently transposed and joined with page 1 of Chart NETREV. Page 2 of Chart NETREV was indavertently transposed and joined with page 1 of Chart NEUT-1.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed with
Open Network Architecture
Access Tariffs

ORDER

Adopted: October 28, 1991; Released: October 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 27, 1991, the Bell Operating Companies[1] (BOCs) filed petitions for waiver[2] of several aspects of the Bureau's *TRP Order,* which specified the cost support material to be supplied in conjunction with Open Network Architecture (ONA) tariffs.[3] The cost support requirement included an on the record filing of any engineering or cost accounting studies used in the development of their ONA rates.[4] On October 4, 1991, American Telephone and Telegraph Company (AT&T), Ericsson Network Systems Inc. (Ericsson), MCI Telecommunications Corporation (MCI), and Northern Telecom Inc. (Northern Telecom) filed comments regarding the BOCs' waiver petitions. The Common Carrier Bureau released an Order on October 18, 1991, addressing issues raised in Ameritech's TRP waiver petition.[5] The *Ameritech TRP Waiver Order* deferred all decisions concerning SCIS filings until after an *in camera* Bureau review of the Ameritech SCIS model, but resolved Ameritech's waiver requests not involving SCIS issues. This Order addresses non-SCIS issues raised in the other BOCs' waiver petitions, and issues raised on the Bureau's own motion.[6]

II. ISSUES

A. Net Revenue Test

1. Pleadings

2. The BOCs request waiver of the Chart NETREV requirement that they provide expense information at an LS1, LS2, and non-premium level for existing feature groups and unbundled BSAs. Bell Atlantic at A-1; BellSouth at 8; NYNEX at 7; Pacific at 6; Southwestern at 5; US West at 12. The carriers contend that they do not collect expense data at the level of detail required in Chart NETREV. Bell Atlantic at A-1; BellSouth at 8; NYNEX at 8; Pacific at 6. Several BOCs explain that the LS1, LS2, and nonpremium designations indicate differences in rates as required by Part 69 of the Commission's Rules, but do not relate to underlying differences in costs. Bell Atlantic at A-1; NYNEX at 8; Pacific at 6. The BOCs propose providing total expenses for the feature groups, and total expenses for the unbundled BSAs. Bell Atlantic at A-1; BellSouth at 8; Pacific at 6; Southwestern at 5; US West at 12.

3. MCI argues that the BOCs' claims regarding LS1, LS2, and nonpremium expenses do not provide a sufficient basis for the grant of a waiver. According to MCI, an applicant for waiver must meet a high burden of proof. The waiver applicant must plead that absent a waiver, it will violate a valid rule. MCI Opposition at 6 (citing *WAIT Radio v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972)). MCI contends that even if the BOCs do not keep records at the level of detail required by the *TRP Order,* the carriers do not demonstrate that they cannot take reasonable steps to comply with the Commission's rule. MCI further contends that the BOCs do not satisfy the standards for waiver because they challenge the rule rather than pleading particular circumstances that require waiver. MCI at 6. MCI urges the Commission to deny these waiver petitions because "it is unclear to MCI how these carriers can purport to develop estimates of cost for the various BSEs, while claiming here that expenses for the remaining Local Switching elements are suddenly 'unavailable.'" MCI at 6-7.

2. Discussion

4. In the *Ameritech TRP Waiver Order* the Bureau determined that Ameritech need not provide expense data disaggregated to the LS1, LS2, and non-premium levels. We found that Ameritech incurs Switched Access ex-

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[1] The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), and US West Communications, Inc. (US West).

[2] Southwestern and US West filed contingency petitions for waiver. These carriers expressed an intent to file applications for review of the SCIS filing requirement. In case the Commission does not rule on that application before November 1, 1991, Southwestern files its petition for waiver as a contingency request. Southwestern at 1-2. US West filed an application for review and petition for stay on October 4, 1991. In light of the actions taken by the Bureau, US West's petition for stay is moot.

[3] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1168, released Sept. 19, 1991 (*TRP Order*).

[4] All of the BOCs, except US West, used the Switching Cost Information System (SCIS) to develop ONA rates. US West used the Switching Cost Model (SCM) to develop its rates. All mention of SCIS in this Order also applies to SCM.

[5] Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1309, released Oct. 18, 1991 (*Ameritech TRP Waiver Order*), Erratum, released Oct. 28, 1991.

[6] We are also including procedures for ONA tariffs to be filed on or before November 1, 1991. *See* Attachment.

penses for all three rate elements together as joint and common costs, but the Commission's Part 69 Rules mandate the structure of the discounted LS1 and non-premium rates.[7] We find that this same reasoning applies to other BOCs. Therefore, the Bureau will allow the BOCs to provide total expenses for the feature groups and total expenses for the unbundled BSAs. *See Ameritech TRP Waiver Order* for chart NETREV.

B. Revenue Neutrality

1. Pleadings

5. US West requests waiver of the portion of the *TRP Order* requiring that carriers separately demonstrate revenue neutrality for recurring and nonrecurring rates. US West at 12-13. US West argues that this disaggregated revenue neutrality showing is incompatible with the price cap rules and the *Part 69 ONA Order*[8] which requires a showing of revenue neutrality for restructured services. Separate revenue neutrality showings for newly created BSEs/BSAs, contends US West, are neither possible nor compatible with the overall revenue neutrality requirement for restructured services. As an example, US West refers to its current rate structure that does not include nonrecurring charges for local switching services. According to US West, the separate revenue neutrality requirement will give the appearance of incremental revenues within the context of Chart NEUT-2. "This makes no sense," claims US West. *Id.* at 13. The carrier argues that a combined revenue neutrality showing satisfies the restructured service revenue neutrality requirement. *Id.* at 14.

6. MCI contends that a showing of revenue neutrality requires a disaggregated showing for recurring and nonrecurring elements. Without this separation, argues MCI, carriers could shift demand and revenues between recurring and nonrecurring elements. MCI concludes that this shifting would make an audit of the tariff filing virtually impossible. MCI acknowledges that US West can alter its recurring and nonrecurring rate relationships after the initial ONA filing. According to MCI, the Commission should deny US West's request for waiver because the carrier made no concrete showing of necessity, or furtherance of the public interest. MCI at 8.

2. Discussion

7. The *TRP Order* requires the BOCs to display revenue neutrality separately for recurring and nonrecurring charges so that the Bureau can properly evaluate the recurring and nonrecurring charges proposed by the BOCs. The BOCs have the opportunity to explain, in their tariff description and justification, how their cost support satisfies the revenue neutrality requirement. Therefore, we deny US West's petition for waiver of this requirement.

C. Demand

1. Pleadings

8. Several carriers request waiver of the *TRP Order* requirement that when BOCs recast historical demand for BSEs, they document which customers will not purchase specific BSEs. Bell Atlantic at A-2; NYNEX at 6; Pacific at 7; US West at 14-15. These BOCs contend that they do not have this customer specific data. Bell Atlantic at A-2; NYNEX at 6-7; Pacific at 7. US West claims that this information is Customer Proprietary Network Information (CPNI), and, that it cannot report this information without violating the Commissions CPNI rules and its own ONA Compliance Plan. US West at 14. Furthermore, carriers argue that customers will object to disclosure of this proprietary information. Bell Atlantic at A-2; NYNEX at 7; Pacific at 7; US West at 15. NYNEX recognizes an obligation to document the assumptions used to develop its BSE demand forecasts, but contends that the Commission does not need customer-specific information to evaluate the validity of recast historical demand. NYNEX Petition at 7. Bell Atlantic offers to identify customers by class –*i.e.*, IXCs, ESPs, and end users – and provide Bell Atlantic's estimate of the expected purchase behavior of the class. Bell Atlantic at A-2.

9. MCI claims that the requirement for customer specific demand is reasonable and justified. MCI argues that the BOCs have an incentive to assume that customers will drop currently bundled functionalities once these items become separate, chargeable BSEs. MCI contends that assuming a BSE demand decrease allows BOCs to increase the price on unbundled BSAs, or other BSEs, and to make up the difference and show revenue neutrality. Furthermore, asserts MCI, if a carrier underestimates the amount of demand for a BSE, it will earn more revenue than it earns under current local switching rates. According to MCI, the incentive to underestimate demand means that public interest dictates placing a high burden of proof on a BOC if it wishes to assume lower demand for unbundled BSEs. MCI at 7. MCI asserts that no carrier has shown that a waiver of this requirement would be in the public interest. *Id.* at 8.

2. Discussion

10. BOCs must fully document their projections of changes in demand from historical levels. For their November 1, 1991 filings, the BOCs may support these projections with estimates of changes in demand by class of customer. We will, however, closely scrutinize all changes to historical demand shown by the BOCs and carefully analyze all demand issues raised by petitioners. The credibility of a carrier's assumptions will depend strongly on the level of support provided by the BOC. The Bureau may require further documentation of demand estimates, including customer specific data, if we conclude that such information is necessary to enable us to review the carrier's tariff filing.

D. Violation of Section 69.113(e)

1. Pleadings

[7] *Ameritech TRP Waiver Order* at 6, para. 16.

[8] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order & Order on Reconsideration & Supplemental Notice of Proposed Rulemaking, FCC 91-186, released July 11, 1991 (*Part 69 ONA Order*).

11. NYNEX and US West request clarification of the effect of a conflict between the *TRP Order* and Section 69.113(e) of the Commission's rules. NYNEX Petition at 8; US West at 15. The *TRP Order* states that carriers should not develop a LS1, LS2, and non-premium pricing structure for BSEs. The Commission rules, however, require that carriers develop a non-premium charge for BSEs in transport or local switching. The carriers request clarification that the *TRP Order* has the effect of waiving the conflicting requirements of Section 69.113(e). NYNEX at 8; US West at 15.

2. Discussion

12. In the *Ameritech TRP Waiver Order,* the Bureau changed charts NETREV and NEUT-1 to reflect the requirement in Section 69.113(e) of the Commission's rules, 47 C.F.R. § 69.113(e), that there be a non-premium rate for BSEs. Consistent with that decision, we therefore wish to clarify the *TRP Order* by stating that we will require all BOCs to develop non-premium rates for BSEs, as reflected in our revised charts.

13. The carriers, however, may experience some difficulty in determining premium and non-premium demand for some non-traffic sensitive BSEs delivered with the lineside BSA (formerly Feature Group A) and the nonpremium trunkside BSA (formerly Feature Group B). Currently, local exchange carriers (LECs) use an allocation method when they cannot determine whether FGA or FGB minutes require non-premium charges. Carriers have developed these allocation methods based on minutes of use. The BOCs may adapt these methods for allocating access minutes, or a carrier may develop an alternate method for determining when to charge non-premium rates for these BSEs. However, the Bureau requires the BOCs to explain fully the assumptions and methods used to determine premium and non-premium demand for BSEs associated with the unbundled BSAs.

E. Recalculation of Rates for Non-Unbundled Feature Groups

1. Pleadings

14. Pacific requests waiver of the portion of the *TRP Order* that requires it to recalculate local switching rates for feature group B (FGB) customers. Pacific Petition at 3. According to Pacific, the *TRP Order* requires three rate levels for trunkside BSAs -- LS1, LS2, and non-premium. In addition, Pacific claims that the *TRP Order* requires carriers to demonstrate revenue neutrality for the entire set of BSAs and BSEs unbundled from a feature group, rather than separately for each of the comparable LS1, LS2, and non-premium BSAs. *Id.* at 2. Pacific suggests that an anomaly arises because Pacific's ONA plan does not unbundle FGB. Pacific contends that under the *TRP Order* the carrier must recalculate the local switching rates for FGB as if that feature group were unbundled and offered as a BSA. Pacific argues that this prescribed calculation would spread the benefit of unbundling FGD to FGB. This result, claims Pacific," undermines the principles of cost causation and rational pricing." *Id.* at 3.

15. Pacific proposes an alternative approach to demonstrating revenue neutrality for local switching elements. Pacific wishes to keep its current rates for FGB and base the LS1 and LS2 rates for its trunkside BSA on FGC and FGD revenues less trunkside BSE revenues. Pacific at 3. Pacific further proposes to calculate rates for the residual lineside BSA (FGA). *Id.* at 3-4. The carrier claims that its approach ensures that the unbundling of other feature groups does not affect FGB customers. *Id.* at 4.

16. If the Bureau grants Pacific's waiver request, the carrier also asks for waiver of lines 5 and 6, columns A, B, and C of Chart NETREV, and lines 5 and 6 columns B, D, and F of Charts NEUT-1 and NEUT-2. Pacific claims that these cells will not be relevant to its tariff filing because the carrier is not unbundling FGB. Pacific at 6.

2. Discussion

17. The *Part 69 ONA Order* requires BOCs to offer one lineside and one trunkside switched access BSA.[9] The trunkside BSA, once feature groups are removed from tariffs in July 1993, replaces FGB, FGC, and FGD trunkside arrangements. The Order contemplated that, in the initial filing, carriers would unbundle these feature groups into one trunkside BSA with the associated BSEs as contained in the BOCs proposed ONA plans. Pacific has not demonstrated good cause to waive this requirement of the ONA Order. The Bureau, therefore, denies Pacific's waiver request.

III. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that the petitions for waiver of the Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Access Tariffs, Order, DA 91-1168, released Sept. 19, 1991, filed by the Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Bell and Nevada Bell, Southwestern Bell Telephone Company, and US West Communications, Inc. ARE GRANTED to the extent provided in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[9] *Part 69 ONA Order* at 8, Para 13.

Attachment

PROCEDURES FOR OPEN NETWORK ARCHITECTURE ACCESS TARIFFS
TO BE FILED ON OR BEFORE NOVEMBER 1, 1991

The Bell Operating Companies[1] (BOCs) are required by the ONA Order[2] to file open network architecture (ONA) tariffs on or before November 1, 1991, on not less than 90 days' notice. Therefore, we anticipate receiving these filings on or before November 1, 1991. In this Attachment we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are not part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should not bear any docket number but must instead bear the designation "ONA ACCESS CHARGE TARIFF FILINGS." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, Downtown Copy Center (DCC), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

The BOCs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. The BOCs are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $490, and (2) they must serve a copy on DCC.

BOCs are reminded of the customer notification requirements as outlined in Section 61.58(a)(4) of the Commission's Rules, 47 C.F.R. § 61.58 (a)(4), concerning rate increases in particular. BOCs are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

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[1] The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (PacTel), Southwestern Bell Telephone Company (SWB), and U S West Communications (US West).

[2] See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, FCC 91-186, released July 11, 1991 (ONA Order), petitions for reconsideration and clarification pending.

In an effort to facilitate identification and cataloging of the tariff filings, the BOCs should:

1. Clearly label any package of revised tariff pages as such, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should not be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes and the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, e.g.: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, VOLS. 1, 2, 3,4, BOX 1 of 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, ONA ACCESS CHARGE TARIFF FILING, VOL. 2-2 OF 2, NOV. 1, 1991.

5. Each BOC should submit its respective Tariff Review Plan and Certification in a separately bound package as required by the Order in the Matter of Commission Requirements for Cost Support Material To be Filed with Open Network Architecture Access Tariffs, DA 91-1169, released September 19, 1991.

6. In addition to the paper copies, each BOC must submit its Tariff Review Plan information in two copies on computer "floppy disks". BOCs should submit their TRP in the LOTUS 1-2-3, version 3.1, spreadsheet provided by the Tariff Division. As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with Tom Quaile, Tariff Review Branch in Room 514-F.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due November 26, 1991, regardless of whether the tariff revisions are submitted on or before November 1, 1991. Replies may be filed only by the publishing BOCs and will be due on December 9, 1991. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and not a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing carrier or petitioner. Additionally, DOC must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the ONA Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the ONA Access Charge Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, DCC. Parties should contact Virginia Cannon of DCC at (202) 452-1422.

For further information, contact: Judith A. Nitsche, Tariff Review Branch

(632-5550)

-FCC-

Attachment

Attachment

ONA ACCESS CHARGE TARIFF FILING

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	DISKETTE	VOL. 1 D&J ONLY	COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF COST MATERIAL
SECRETARY'S OFFICE - ROOM 222	1	2	-	-	-	-
PUBLIC REFERENCE ROOM	1	1	-	-	-	-
DOC - ROOM 246 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 514	1	-	-	-	1	-
ANN STEVENS ROOM 514	1	-	-	-	1	-
TOM QUAILE ROOM 514-F	1	-	2	1	-	2

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 1, 1991

US WEST FILE PETITION FOR WAIVER FOR SEPARATE INFORMATION SURCHARGE RATE ELEMENT
Pleading Cycle Established

Comments Due: November 15, 1991
Reply Comments Due: November 29, 1991

On September 30, 1991, US West filed a petition for waiver of Part 69 of the Commission's Rules to establish a separate information surcharge rate element. Section 69.405 of the Commission's Rules requires that the interstate portion of white pages directory expenses be recovered on a per call basis through the information rate element. US West seeks permission to recover these costs through a separate information surcharge rate element which would apply to all interstate access minutes of use (MOU).

US West states that currently the costs associated with providing directory assistance (DA) and white pages publication are combined in a single information rate element. US West notes that these costs are recovered on a per call basis through a DA service charge. US West asserts that it is inappropriate for DA users to bear the cost burden of publishing and distributing white pages -- a service which benefits all end users. US West asserts that a more cost-causative approach is to recover white pages expense through a separate rate element which is levied on all interstate access switched MOUs.

Interested parties may file comments regarding the US West petition for waiver no later than November 15, 1991. Reply comments may be filed no later than November 29, 1991.

An original and four copies of all comments and replies must be filed in accordance with Section 1:51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

Copies of the waiver petition and other related documents may be obtained from Downtown Copy Center. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-314

In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services	RM-7140, RM-7175 and RM-7618

POLICY STATEMENT AND ORDER

Adopted: October 24, 1991; Released: October 25, 1991

By the Commission: Commissioner Barrett issuing a separate statement.

1. The Commission issues this Policy Statement to provide preliminary guidance for the development of personal communications services (PCS) in the United States and to solicit additional views addressing a wide range of issues affecting future development of PCS. This Policy Statement will serve as the basis for an *En Banc* hearing that we believe will better inform the Commission about this important communications development.

2. The concept of PCS has grown in scope and complexity since the ideas of second generation cordless telephone service (CT-2) and personal communications networks (PCNs) were introduced about two years ago. A class of mobile and/or portable technologies and services is developing under the name of PCS that promises both advanced generations of current mobile/portable services and new services. Comments filed in response to the *Notice of Inquiry* in this proceeding indicate broad interest from new entities such as cable TV providers, microwave common carriers, and private radio entities, in addition to the local exchange carriers and cellular radio telephone providers.[1] Equipment manufacturers also have shown strong interest in unregulated, wireless office concepts. Computer manufacturers who envision PCS providing networking capabilities for future personal computers also have entered the field. While it seems certain that these new underlying technologies will offer an array of advanced voice and data services, such as improved wireless links for computers and medical equipment, PCS will provide the more fundamental capability of communicating directly to individuals rather than locations.

3. The Commission intends to broadly define personal communications services and make available an adequate amount of spectrum to foster the development of innovative and competitive markets for these services.[2] The spectrum allocation should facilitate local, regional, national and international uses. Additionally, the spectrum should be allocated in phases in order not to find early developments precluding later ones. The first phase should occur in 1992.

4. Important equipment, cost and international considerations suggest that a portion of the spectrum to be allocated should come from 1.8 to 2.2 GHz. We recognize that serious issues may exist for the incumbents in this band and we intend to reallocate the spectrum needed for PCS with minimum disruption to existing users. Explorations of spectrum availability in that band should proceed to a successful conclusion and should answer the questions dealing with sharing and the cost of substituting services. We also observe that in preparing for the 1992 World Administrative Radio Conference (WARC), the Commission proposed to maintain the primary mobile service allocations in the 1.8 to 2.2 GHz band. This would provide the United States with the flexibility to implement PCS based on domestic needs. We intend to consider the results of the WARC in developing our domestic PCS allocations.

5. Additionally, PCS developments will be encouraged in less congested bands. We will monitor closely current experiments in those bands and license quickly future experiments aimed at utilizing unused frequencies for this family of services.

6. We will encourage significant flexibility in the development of technologies and services. Anticipating, however, difficult issues dealing with transmission systems, interference avoidance, inter and intra industry protocols, roaming and other technical issues, we will empanel an advisory committee to help resolve those issues. If necessary, the advisory committee will make recommendations to the Commission for establishing rules when issues cannot be privately resolved.

7. Mobile services traditionally have been provided pursuant to both common carrier and private regulatory schemes. Each has its advantages and disadvantages. We lack sufficient information now to determine whether common carriage, private carriage, or some combination of both concepts will be optimal for PCS. The regulatory scheme we eventually decide upon will depend in part upon public interest factors such as our desire to promote the rapid development of this service and our interest in promoting competition in PCS and in telecommunications generally.[3]

8. Commission policy towards PCS will be guided by these general conclusions. But we do not have sufficient information before us to propose tentative conclusions on how all the issues should be resolved. We seek additional information on issues such as how licenses should be assigned and policies affecting participation in PCS by new entrants, *e.g.*, parties not currently engaged in the provision of telecommunications services, including the application of pioneer's preference and possible financial

[1] *See Notice of Inquiry* in GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990).

[2] Consistent with this broad definition, we will consider the data PCS proposed by Apple Computer, Inc. (RM-7618) as part of the family of PCS services to be addressed in this proceeding.

[3] The Commission is in the process of forming a Small Business Advisory Committee. One of the functions of the Small Business Advisory Committee will be to review FCC dockets in new, emerging technologies/services and to assess the policy implications of such developments on small businesses, including the impact on rural businesses and minority and female entrepreneurs. Included in this Committee's work will be an assessment of the potential impact of PCS allocation and licensing decisions on the participation of small businesses and new entrants.

qualification issues. The *En Banc* hearing will be structured to address these and other questions relating to four general areas:

(1) *definition of personal communications services,* for example, the types of service anticipated and demand for each service type;

(2) *spectrum requirements,* such as the amount of spectrum required for PCS, the timing of spectrum allocation, the desirable spectrum for various members of the PCS family of services, bandwidth requirements, the accommodation of current licensees, and the ability to share spectrum;

(3) *technologies for personal communications services,* such as the relative advantages of competing technologies for different applications, the degree of technical flexibility that should be granted PCS licensees, the results of PCS experiments or trials, the role of unregulated low power devices, and the need for mandated Commission standards; and

(4) *regulatory issues,* such as the method of assigning licenses, the appropriate geographic scope of licenses, the feasibility of a voluntary negotiated approach to relocating existing users, the merits of exclusive as compared to non-exclusive assignments, privacy implications of personal radio-based communications services, the terms and conditions of interconnection to the public switched network, the need for a new numbering plan, the need to accommodate roaming subscribers, licensee eligibility, regulatory jurisdiction, and appropriate regulatory treatment of PCS.

9. Accordingly, IT IS ORDERED THAT, the Commission shall hold, on December 5, 1991, an *En Banc* hearing.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Amendment of the Commission's Rules to Establish New Personal Communications Service (General Docket No. 90-314, RM-7140, RM-7175 and RM-7618

I am pleased to see this effort. I think we should begin to address the regulatory framework for PCS services. This item initiates that action. I will be particularly interested in reviewing comments that address the various ways we can ensure that PCS gives new entrants and small businesses new opportunities to get into the mobile service business. Whether that be through private carriage, or some combination of private and common carriage, I hope commenters will address these matters from that perspective. Also, I hope we have flexibility in our spectrum allocation scheme for PCS. I look forward to our December en banc to discuss these issues further.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cost Allocation Manuals of The Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Corporation, Central Telephone Company, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company, Southern New England Telephone Company and U S West — AAD 91-53

ORDER

Adopted: October 31, 1991; Released: November 13, 1991

By the Chief, Common Carrier Bureau

I. INTRODUCTION AND BACKGROUND

1. On February 22, 1991, MCI Telecommunications Corporation (MCI) filed comments on cost allocation manual (CAM) revisions submitted by local exchange carriers (LECs) in December 1990.[1] In its comments MCI argues that the LECs fail to provide adequate explanations and quantitative information on proposed revisions to their CAMs. On March 11, 1991, these LECs filed replies to MCI's comments. We have reviewed MCI's comments and the LECs' replies and accept the CAM revisions subject to certain conditions stated in this order.

2. In the *Joint Cost Order*,[2] the Commission required Tier 1 carriers[3] to file manuals to separate the costs of regulated telecommunications services from the costs of nonregulated activities. The LECs filed their original cost allocation manuals in 1987. The manuals describe their nonregulated activities, list the activities they propose to treat as incidental, and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. The LECs have filed revisions pursuant to Bureau orders and have subsequently filed quarterly updates.

II. DISCUSSION

3. MCI's comments and the LECs' replies focus on three areas: (1) adequacy of explanations of CAM revisions, (2) adequacy of explanations of allocation methodologies, and (3) need for quantitative information.

(1) Adequacy of Explanations of CAM Revisions

4. MCI states that the Commission should require the LECs to annotate proposed revisions with complete explanations of the changes. MCI argues that under the current system the LECs may obscure the real reason for a proposed CAM change simply by providing insufficient data. According to MCI, this makes even a superficial analysis of the revision impossible.[4]

5. As an example of inadequate explanations of CAM revisions, MCI claims that SWB fails to explain why it is changing its method of establishing cost pools in Account 2362, Other terminal equipment. In addition, MCI states that it is unclear why SWB proposes to apportion costs in several plant accounts on the basis of "current regulated and nonregulated investment value" rather than "relative investment costs." MCI also comments on BellSouth's proposal to remove equal access/network reconfiguration (EA/NR) investment from the relative investment value allocator used to apportion certain cost pools. MCI questions BellSouth's previous reliance upon this allocation method if inclusion of EA/NR investment was, as BellSouth claims, not cost-causative. Finally, MCI states that Bell Atlantic did not justify its inclusion of additional elements in the wages and salaries allocator used in several accounts.[5]

6. In its reply, SWB states that it describes and explains changes when it files each CAM revision, and that its CAM contains detailed descriptions of all allocators. SWB claims that a comparison of a revised allocation methodology with the previous method will frequently explain the reason for a change. SWB argues that MCI did not make this comparison when reviewing its revisions to Account 2362.[6] BellSouth explains that it proposes removing EA/NR investment from the relative investment allocator of various pools in Account 7240, Operating other taxes, because EA/NR costs are exclusively regulated and are directly assigned. According to BellSouth, it is removing EA/NR investment from the relative investment allocator used in Accounts 1140, Special cash deposits, 7510, Interest on funded debt, and 7540, Other interest deductions, because special cash deposits and debt expense associated with these accounts are not associated with EA/NR investment-related activities.[7] Bell Atlantic states that previously it included only expense-related salaries and wages in the allocation formula of certain accounts. However, Bell Atlantic asserts that now its cost allocation

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[1] The following LECs filed revisions: The Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), Central Telephone Company (Centel), NYNEX Telephone Companies (NYNEX), Rochester Telephone Corporation (Rochester), Southwestern Bell Telephone Company(SWB), Southern New England Telephone Company (SNET), and U S West, Inc. (U S West).

[2] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[3] A Tier 1 carrier is defined as a carrier that earns more than $100 million in total company regulated annual revenues.

[4] MCI Comments at 2.

[5] MCI Comments at 3-4.

[6] SWB Comments at 3-4.

[7] BellSouth Comments at 2.

system can capture additional wages and salaries that are relevant to this allocator. Bell Atlantic argues that this change promotes cost-causative cost allocations because it will ensure that all relevant wages and salaries are used in the allocator, not just those captured in the expense accounts.[8]

7. We find that the reasons for SWB's change to the "current regulated and nonregulated investment value" allocator are not apparent from the information provided in its revisions. In addition, the description of this allocator in SWB's CAM is unclear. Within 30 days of the release of this order we require SWB to submit a letter explaining the proposed new allocator and the reasons for this change. We also require SWB to include in its next quarterly filing, a revised description of its proposed new allocator that is consistent with the description contained in its letter.

8. We find that BellSouth's explanation for removing EA/NR costs from Account 7240 is unclear. We require BellSouth to submit a letter, within 30 days of the release of this order, which clearly states, in detail, the reasons for the revisions to this account. We also find that BellSouth's explanation for excluding EA/NR investment from the allocator used in Accounts 1140, 7510 and 7540 is unacceptable. Normally, amounts recorded in these accounts can not be identified with specific regulated or nonregulated activities. Therefore, we are unable to understand BellSouth's claim that amounts recorded in these accounts are not associated with EA/NR investment-related activities. We require BellSouth to explain in its letter why it proposes to remove EA/NR investment from the relative investment allocator used in Accounts 1140, 7510 and 7540.

9. Except in the specific cases discussed above, we accept SWB's and BellSouth's revisions.

10. We agree with MCI that in many instances the LECs did not initially provide adequate explanations of the reasons for changes made in their CAMs. As part of their reply comments in this proceeding, most of the LECs gave detailed explanations of the revisions questioned by MCI. As part of our continuing efforts to improve the CAM review process, our staff has directed that the LECs provide more detailed explanations of their revision and the reasons for these revisions beginning with the June 30, 1991, CAM revisions.[9] This should alleviate MCI's concern regarding the lack of detailed information.

(2) Adequacy of Explanations of Allocation Methodologies

11. MCI argues that without an explanation of underlying analysis or reasons that substantiate the use of one allocator over another, it is impossible to make a rational assessment of a revision. MCI cites examples of alleged inexplicit allocation methodologies included in the LECs' revisions. MCI states that NYNEX proposes to use a cost-causative relationship to assign costs to pools in Account 2124, General purpose computers. MCI complains that there is no guarantee that the relationship actually reflects true cost causation because NYNEX does not explain the standards it will use to determine this relationship. With respect to U S West's revisions, MCI states that there is not enough information to determine the appropriateness of its proposal to reduce the number of cost pools in Account 6711, Executive.[10]

12. NYNEX replies that MCI misreads its revision because the language it objects to has been in its CAM unchanged since September 1989. NYNEX argues that the actual change to this portion of its CAM is the deletion of a sentence explaining limitations in the scope of its computer usage study. NYNEX states that its computer usage study formerly analyzed only the largest 100 projects, but now includes all computer projects in the analysis of regulated/nonregulated usage. NYNEX argues that this expansion of the computer usage study is a refinement which improves the cost-causative approach of its allocation method.[11]

13. U S West states that previously it identified Account 6711 costs by executive job function codes and apportioned these costs in 38 cost pools within the account. Now, however, U S West explains, these executive wages have been reclassified and recoded to their respective departmental expense codes. U S West maintains that by assigning expenses to other Part 32 accounts that actually drive these costs, the cost-causative principle will be better achieved. U S West argues that reducing the number of cost pools in Account 6711 eliminates redundancy in the cost pools of other accounts and achieves overall consistency with other Bell Operating Companies' CAMs.

14. We accept U S West's and NYNEX's revisions. However, we require NYNEX to submit additional clarifying information. Although MCI's comments concerning the NYNEX CAM did not focus on revisions filed in December of 1990, we believe MCI's observation is valid. As part of its next quarterly filing, we require NYNEX to revise its CAM to include a description of the cost-causative relationship used to assign costs to pools in Account 2124, General purpose computers.

(3) Need for Quantitative Information

15. MCI states that the LECs offer vague narrative descriptions of changes which purportedly improve cost allocations but they submit no information on their impact. As an example, MCI notes SWB's proposal to replace its "average wage dollar per hour" allocator with an "average labor rate per hour" for certain cost pools used in several plant specific expense accounts. MCI argues that it has no way of determining whether it should support or oppose this proposal because of SWB's failure to explain the difference between a wage dollar and a labor rate.

16. SWB did not address this issue raised by MCI, but Ameritech and NYNEX both address MCI's general concerns relating to quantitative data. Ameritech states that

[8] Bell Atlantic Comments at 2.
[9] Our staff plans to codify the procedures for the CAM format changes in the near future.
[10] MCI Comments at 4.
[11] NYNEX Comments at 2.

the impact of a change is not relevant to this filing since a detailed analysis of the quantitative impact of a revision is not required by the Commission. NYNEX states that the impact of CAM revisions on joint cost allocations is an issue in the *Computer III Remand* [12] proceeding and that MCI should address this issue in that proceeding.[13]

17. The Commission does not now require that the quantitative impact of proposed changes to the CAMs be included in the revisions filed by the LECs. As pointed out by NYNEX, this issue is under consideration by the Commission in the *Computer II I Remand* proceeding and will be addressed in that context. However, like MCI, we are unable to determine the difference between the former "average wage dollar per hour" and the proposed "average labor rate per hour" using the information contained in SWB's revisions. Therefore, we require SWB to include in its letter (para. 8) an explanation of the difference between these two terms and the reason for this revision.

18. We accept the CAM revisions submitted by the LECs in December 1990, with the exception of the particular items discussed in paragraphs 7, 8 and 14 above. In these situations carriers must provide more information before we will approve the proposed CAM change.

III. ORDERING CLAUSE

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 CFR §§0.91, 0.291, That the revisions filed by The Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Corporation, Central Telephone Company, NYNEX Telephone Companies, Rochester Telephone Corporation, Southwestern Bell Telephone Company, Southern New England Telephone Company and U S West, Inc. ARE ACCEPTED subject to the conditions noted in this Order.

20. IT IS FURTHER ORDERED, That BellSouth Corporation, Southwestern Bell Telephone Company and NYNEX Telephone Companies shall submit further revisions and clarifications as specified in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[12] Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 174 (1990) (*Computer III Remand).*

[13] NYNEX Comments at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-338

In the Matter of

Amendment of Section 73.202(b), RM-7852
Table of Allotments,
FM Broadcast Stations.
(Belen and Grants, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 1, 1991; Released: November 14, 1991

Comment Date: January 6, 1992
Reply Comment Date: January 21, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Don R. Davis ("petitioner") requesting the deletion of Channel 288C from Grants, New Mexico, and its reallotment, as a Class A, to Belen, New Mexico, as the community's second local FM service.[1] Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the reallotment of Channel 288, as a Class A, from Grants to Belen, New Mexico, since it could provide the community with its first competitive FM transmission service. Channel 288A can be allotted to Belen in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Mexican concurrence in the allotment is required because Belen is located within 320 kilometers (199 miles) of the U.S.-Mexican border. We note, however, that the Commission generally refrains from reallotting a channel from one community to another where interest in use of the channel at its present location is demonstrated by the filing of an application. Therefore, should an acceptable application be filed for Channel 288C at Grants, Channel 288A may not be allotted to Belen absent a compelling showing that the public interest would be better served by its reallotment. *See Montrose and Scranton, Pennsylvania,* 3 FCC Rcd 1061 (1988), *recon. den.* 4 FCC Rcd 7799 (1989).

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
Belen, New Mexico	249C	1249C1, 288A
Grants, New Mexico	265A, 279C, 288C	265A, 279C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 6, 1992,** and reply comments on or before **January 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Don R. Davis
3611 Altamonte Avenue, N.E.
Albuquerque, New Mexico 87110
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

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[1] Petitioner also requested that the pending application of Cibola Radio Partnership (BPH-871113MG) for Channel 288C at Grants be modified to specify Channel 279C. However, the Cibola Radio Partnership application was dismissed on June 28, 1989, and the petition for reconsideration of that action was denied on August 15, 1991. Therefore, modification of the application is unnecessary.

[2] The coordinates for Channel 288A at Belen are North Latitude 34-39-30 and West Longitude 106-46-24.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure:
Average Schedule Companies

MEMORANDUM OPINION AND ORDER

Adopted: October 21, 1991; Released: November 15, 1991

By the Commission:

I. INTRODUCTION

1. In response to a remand from the United States Court of Appeals for the District of Columbia Circuit,[1] we hereby reaffirm our approval of the average schedules that were in effect between June 1, 1986 and March 31, 1989 ("the 1986 Schedules").[2] After considering the three primary questions posed by the court, we (a) find a reasonable basis to approve the 1986 schedules; (b) reject a proposed alternative methodology for computing the schedules; and (c) find reasonable support for the transition plan established in the 1986 schedules.

II. BACKGROUND

2. Average schedules are used to compensate certain local exchange carriers (LECs) for the use of their services in originating and terminating interstate calls. In order to determine appropriate LEC compensation for these services, LEC investment and expenses are apportioned between regulated and unregulated activities, apportioned or "separated" between the interstate and intrastate jurisdictions, and allocated to various access elements. This process generally requires the preparation by the LECs of "cost studies," which involve significant data collection, analysis, and reporting. The larger LECs have the expertise and other resources necessary to perform these studies efficiently, and their interstate revenue requirements are so large that considerable precision in determining the costs on which their interstate rates is clearly warranted. Smaller LECs, on the other hand, may not have the data, expertise, or the resources in-house to perform these studies and may have to hire outside consultants at substantial expense, especially compared to the relatively small size of the interstate compensation they receive. The Commission's rules have recognized that it may be inefficient to require cost studies in all cases and, accordingly, have permitted certain LECs to receive interstate settlements on the basis of a set of "average schedules" that are "designed to produce disbursements that would be received . . . by a [cost study] company that is representative of average schedule companies."[3]

3. The initial average schedules were first filed by AT&T in June, 1983.[4] AT&T's proposed schedules featured a usage-based formula, known as "Average Revenue Per Message" or ARPM, that compensated average schedule companies for each interstate telephone call or message carried over their access lines. This usage-based formula was an anomaly under which average schedule companies (unlike non-average schedule companies or "cost companies") were compensated for the fixed or "non-traffic sensitive" (NTS) portion of their costs according to their traffic volume, despite the fact that fixed costs by definition do not vary as traffic increases. As discussed below, this model was inconsistent with section 69.606(a) of our Rules, and resulted in certain companies with heavy traffic volumes receiving compensation well beyond their actual costs of doing business since their costs did not in fact rise at a rate proportional to their traffic volumes.

4. On November 14, 1983, the Commission adopted an order concluding that AT&T's proposed schedules incorporated "satisfactory *guidelines* for calculation of 1984 average schedules."[5] In "accepting" the 1983 schedules,[6] the Commission recognized that AT&T had not performed all the steps that would be necessary to produce average schedules that accurately "simulated" disbursements to a cost company that is representative of average schedule companies, that it would be impossible to perform those steps during the short period before divestiture, and that the public interest would be served by accepting a quick fix to existing arrangements for use during the initial access period.[7] The "acceptance" of the 1983 schedules was not appealed.

5. On September 17, 1985, NECA filed the proposed revisions at issue.[8] NECA's proposed 1986 schedules had two key features. First, consistent with our rules, the schedules eliminated the usage-based ARPM formula for compensating common line costs in favor of a non-traffic-sensitive measurement based on the number of common lines.[9] Second, the schedules featured a transition plan to phase in the reductions in compensation that some companies would receive under the new schedules.

6. Unlike prior revisions, the 1986 revisions were developed through the joint efforts of the National Telephone Cooperative Association (NTCA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), NECA, and the United States Telephone Association (USTA).[10] Collectively, the NTCA, OPASTCO, NECA, and USTA memberships include virtually all of the exchange carrier telephone companies in the country, thus ensuring input from those average schedule companies that would be directly affected by the average schedules. In addition, in contrast with the ARPM schedules, the 1986 proposals were based on the most recent available data (1983 investment and expense data for average schedule companies),[11] and were designed to incorporate changes that had been made to the Commission's Part 67 separations rules[12] through 1984.[13] The 1986 proposals also contained an automatic adjustment mechanism that permitted the actual operating experience of the NECA pools to be reflected in average schedule settlements.[14]

7. ICORE, a consulting firm representing companies that would have experienced large settlement reductions under the 1986 revisions, objected to the proposed schedules.[15] The Commission approved the schedules on April 11, 1986,[16] over those objections. The Commission ac-

knowledged that improvements were possible in the data, studies and methodologies that had been used in developing the 1986 schedules. Nevertheless, the Commission concluded that the proposed revisions were an improvement and provided a better basis for average schedule settlements than the previous ARPM schedules because the 1986 schedules contained more recent data, eliminated traffic volume based compensation under the ARPM schedules, and complied more closely with our rules.

8. The ICORE exchange carriers filed a petition for review of the Commission's approval of the 1986 schedules. The United States Court of Appeals for the District of Columbia Circuit on July 7, 1987, remanded for further consideration that portion of the Commission's decision that approved NECA's proposed settlement schedules and transition plan.[17] The court stated that the Commission's order did not demonstrate a rational basis for approving the proposed revisions. Specifically, the court held that the Commission: (1) had failed to provide adequate explanation of why, despite the large number of problems with the NECA support material identified in the record, the new schedules represented an improvement over the old schedules;[18] (2) had failed to recognize and consider an alternative to NECA's method proposed in the record – a "full scale cost study of scientifically selected average schedule companies";[19] and (3) had "improperly ignored" ICORE's argument that the flash-cut proposed by NECA was "grounded on an inaccurate figure."[20] The court did not vacate the 1986 schedules, permitting NECA to continue payments under the new schedules and transition plan pending further Commission action.

9. In response to the court's remand, the Common Carrier Bureau directed 35 questions to NECA concerning the data, statistical tests, methodologies, and safeguards that NECA had employed in preparing its proposed revisions.[21] It then invited public comment on NECA's responses in light of the court's remand order and the record that had been before the court.[22]

III. REMAND ISSUES

A. The 1986 Schedules Are Reasonable.

10. After review of the original record and the augmented record compiled on remand, we reaffirm the Commission's approval of the 1986 schedules. The 1986 schedules were based on a sound methodology that has produced reasonable results. In particular, the non-traffic sensitive formula for compensating common line costs in the 1986 revisions was a substantial improvement over the existing ARPM formula, as it conformed more closely with our rules, was based on more recent data, and eliminated unfair windfalls resulting from the ARPM schedules.

1. NECA Methodology

11. As noted by the court,[23] NECA essentially followed a three-step process in arriving at its proposed 1986 revisions. First, NECA analyzed cost information in a data base of 255 cost companies, and determined that relevant characteristics of these companies were sufficiently representative of average schedule companies. On the basis of this cost information, NECA developed "access element allocation factors" as a means of allocating expense and investment for the cost companies to 21 "access categories," such as common line (comprising NTS costs), traffic sensitive, and billing and collection. In this regard, NECA calculated the costs that each cost company had in the 21 access categories, and calculated average ratios of costs for the 255 companies in each of the 21 categories. NECA tested these factors for correlation with various demand, investment and expense variables, and adjusted the factor for one investment category on the basis of the results.

12. Second, NECA determined the total revenue requirement in each of the 21 access categories for each average schedule company. To do so, NECA looked at 1981 to 1983 investment and expense data for 489 average schedule companies that NECA said were representative to determine each average schedule company's total costs. NECA projected this data to reflect growth for average schedule companies through 1986. NECA then applied the ratios described above to determine the costs or "revenue requirement" for each company in each of the 21 access categories.[24]

13. In the third step of its methodology, NECA developed formulas to relate the revenue requirements for each access category for each company to an appropriate compensation formula. For non-traffic sensitive, or common line costs, NECA determined, after statistical testing and modeling, that the appropriate demand quantity to relate common line costs to a compensation formula was the number of access lines per company. For instance, NECA determined, on the basis of these modeling formulas, that most average schedule companies would recover their common line costs if they were compensated at a rate equal to $8.06 per access line per month.[25]

2. Positions of the Parties

14. On remand, ICORE continues to criticize each step of NECA's methodology. ICORE argues that the cost company data sample utilized by NECA is flawed because the 255 cost companies studied by NECA are "significantly larger" than the average schedule companies.[26] ICORE also criticizes NECA for arbitrarily excluding certain cost companies from the data sample,[27] and for not "stratifying" the 255 cost companies "based on the peculiar characteristics of each exchange".[28] ICORE asserts that NECA's "allocation factors" are flawed because when one attempts to "work backwards" from the allocation factors to the figures of the individual cost companies on which the factors are based, the results are "woefully inadequate" in replicating the actual costs reported by the cost companies."[29]

15. ICORE also challenges the representativeness of the 489 average schedule companies studied by NECA, contending that even NECA admits that the companies studied by NECA are "somewhat larger" than typical average schedule companies.[30] Likewise, ICORE challenges the growth calculations used by NECA in the second step of its analysis,[31] the demand data used by NECA in the third stage of its methodological process,[32] and a number of the specific computations made by NECA in formulating the 1986 schedules.[33]

16. ICORE repeats its contention that the ARPM settlements schedules should be retained because those schedules were developed scientifically on the basis of probability samples of exchanges that were subject to actual cost studies, whereas NECA's schedules were not developed scientifically.[34] ICORE claims that the 1983

ARPM Schedules were based on "careful, painstaking statistical and cost analysis, verified at each step by AT&T and USTA." ICORE contends that the AT&T-USTA analysis estimated revenue requirements to a precision of 1-2 percent at a 90 percent confidence level.[35] ICORE also observes that the ARPM methodology had been used for more than 30 years.[36]

17. All other parties state that NECA's settlement schedules should be reaffirmed, and that the ARPM settlements schedules should not be reinstituted.[37] NECA, OPATSCO, and USTA all state that the ARPM schedules were no longer able to achieve a reasonable simulation of common line costs, and that NECA's flat-rate common line compensation formula is clearly a more accurate way to reflect non-traffic sensitive costs, the key point at issue with regard to NECA's 1986 revisions.[38] NECA observes that the ARPM methodology was developed in 1934, "long before the advent of long distance competition," and that it did not take cognizance of our access charge rules. Moreover, NECA states, the ARPM schedules did not reflect Part 67 rules changes that governed jurisdictional separations, and the ARPM schedules also failed to reflect changes in the competitive interexchange services marketplace.[39]

18. Parties also note that the ARPM schedules produced excessive compensation for some average schedule companies.[40] For example, NTCA states that a number of factors were capable of distorting settlement amounts under the ARPM schedules, including the "existence of resale operations" and the fact that common line settlements under ARPM were "bounded only by the number of [resold] messages that an average schedule carrier [could] 'pump' through its exchange(s)."[41] NTCA states, for example, that the "immense message volumes and common line settlements amounts" received by the Northwest Iowa Telephone Company in June 1986 exceeded by "55 times the unseparated national average cost of providing common lines."[42]

3. Discussion

a. The 1986 Schedules Were Based on A Sound Methodology.

19. In analyzing ICORE's criticisms of NECA's methodology, we note that there are at least two possible approaches to the generic problem of developing average schedules to compensate LECs in the absence of actual cost studies for each of these companies. NECA's approach was to analyze cost companies similar to average schedule companies, and to construct allocation factors (*i.e.*, ratios) reflecting that analysis that could be applied to average schedule companies. ICORE, on the other hand, argues that the best approach was to conduct cost studies on a sample of representative average schedule companies and to apply the results to the remaining average schedule companies.

20. While ICORE appears to criticize NECA's method as unsound, it provides no convincing demonstration why NECA's process, *per se*, would yield unreasonable results. If average schedule companies' cost allocation ratios mirror the allocations that similar cost companies use in allocating their costs, the allocation results would be similar. In other words, NECA's "look alike" process should produce reasonable results if the cost companies NECA used were similar to the average schedule companies they are intended to look like.

21. ICORE's argues strenuously that the cost companies studied by NECA were not sufficiently representative of average schedule companies. We reject this claim and find that the group of cost companies studied by NECA was sufficiently similar to the universe of average schedule companies.[43] As noted above, NECA began its analysis by studying 255 cost companies to determine how they allocated their costs among 21 access categories. The data base from which NECA drew this group of cost companies was the most comprehensive data base then available, and had served as the basis for the first access tariffs.[44] Of the 736 independent cost companies profiled in the data base, NECA excluded 476 companies for insufficient data or apparent data errors, and excluded five additional companies for exceeding a size limit set by NECA at 210,000 access lines per company.[45]

22. ICORE complains that NECA's size limit of 210,000 access lines was too large, and states that the 255 companies actually studied by NECA are larger than (and therefore not representative of) average schedule companies. Although NECA excluded the largest cost companies, it is true that the 255 cost companies studied by NECA include many that are somewhat larger than most average schedule companies. Although this raises some concern, we find no persuasive evidence that the size differential produced unreasonable results. We note in this regard that the cost companies were not used to determine the magnitude of costs faced by average schedule companies, but were used solely to simulate the manner in which cost companies allocated their total costs among 21 access categories. Even though many of the cost companies are larger than average schedule companies, it does not follow that those companies "allocated" their costs in a different manner from smaller "cost companies" or average schedule companies. In fact, NECA asserts, to the contrary, that there is evidence indicating that the size of the cost companies did not affect their allocation of costs,[46] and ICORE does not persuasively substantiate its view that the size limits that have been chosen adversely affect cost allocation ratios. Thus, although in theory it would have been preferable to have a sample of cost companies that more closely matched the size of average schedule companies, we cannot conclude that NECA's reliance on the cost company data base was unreasonable or that it produced inappropriate results.

23. Moreover, even assuming that NECA's reliance on the cost company data base produced some distortions, there is no basis for concluding that any such distortions were significant, or that they approached the magnitude of the distortions caused by use of the ARPM schedules, discussed below. In this regard, we note that NECA's methodology appeared to produce reasonable settlement rates for average schedule companies in relation to the level of compensation received by cost companies. For example, while cost companies were receiving average compensation of $5.40 per access line per month,[47] monthly common line settlements for average schedule companies under the 1986 schedules ranged from $8.06 to more than $16.00 per access line per month. Thus, although NECA initially focused on cost companies in developing its proposed schedules, the formulas it produced appear to have compensated average schedule companies for the higher costs of service that were represented by the financial data that NECA had for average schedule companies. In contrast, as discussed at length in the following section, the ARPM schedules re-

sulted in compensation that had no relation to costs, providing as much as $862.00 per access line per month for one average schedule company. Under these circumstances, the 1986 schedules, even if flawed in some respect in their derivation, were much more reasonable in their application than the ARPM schedules.

24. We also reject ICORE's critique of NECA's reliance on the sample of 489 average schedule companies, and find that the sample is sufficiently representative to justify our acceptance of the 1986 revisions. To begin with, the average schedule company sample was an unusually large sample, representing approximately 87 percent of the total number of average schedule access lines in the universe.[48] The fact that almost 7/8's of all average schedule lines were included in the average schedule sample provides some comfort that the sample was representative. Moreover, although the mean size of the average schedule companies in the sample was somewhat larger than the mean size of all average schedule companies, NECA performed studies that determined that other relevant factors were similar or identical in both groups. For example, sample average schedule companies had a mean average of 5.4 messages per interstate acccess line compared to an identical mean average of 5.4 messages per interstate access line for all average schedule companies.[49] Accordingly, there is evidence that, despite a size differential, other key characteristics of the average schedule companies in the sample were representative of key characteristics of all average schedule companies.[50] Again, we see no evidence that the 1986 schedules produced unreasonable results, and we find substantial evidence that they were a dramatic improvement over the ARPM schedules.

25. NECA's methodology was superior to the ARPM schedules in other areas as well. For example, NECA's proposal was also designed to reflect more fully our Part 69 rules[51] and use more recent data.[52] It was also designed: (1) to reflect more completely changes that had occurred in jurisdictional separations than had the 1983 settlement guidelines;[53] (2) to employ a residue ratio approach that resulted in average schedule settlements more closely simulating cost company settlement distributions from the interstate pools than was the case under the 1983 guidelines;[54] and (3) to insure that tariffed charges more closely approximated the costs of providing interstate communications services than would otherwise have been the case.[55]

26. Nor does ICORE persuade us that any other alleged problems with NECA's methodology were serious enough to render the 1986 schedules unreasonable.[56] For example, ICORE states that it tested NECA's allocation factors by applying them to individual cost companies, and that the resulting figures did not replicate the company's actual cost allocations. However, ICORE's "test" is seriously flawed and does not refute the validity of NECA's allocation factors. Allocation factors represent *average* allocations for 255 companies, and were not designed to yield precise allocations for individual companies. ICORE's analysis only proves that an individual company's actual costs may differ from allocation factors that represent an *average* of all companies, which is a neccesity when creating "average" schedules. ICORE's highly technical allegations regarding NECA's (a) specific exclusions to its cost and average schedule company data bases; (b) growth calculations; (c) demand data; and (d) general computations, are rejected in the attached appendix. This appendix demonstrates that any imperfections in these areas are not of decisional significance.

b. The 1986 Schedules Were More Reasonable than the ARPM Schedules.

27. Even though improvements in NECA's approach were conceivable,[57] continued use of the 1983 ARPM schedules until those improvements could be made clearly would not have been reasonable. Indeed, the serious defects in the ARPM schedules lead us to conclude that another basis of support for the reasonableness of the 1986 revisions was their dramatic superiority over the ARPM schedules.

28. The 1983 ARPM schedules did not even purport to comply with the requirement in our rules that average schedule disbursements simulate disbursements to cost companies. As explained above, average schedule companies, unlike cost companies, were compensated for their fixed common line costs under the ARPM schedules based on a usage-based formula unrelated to their costs. Under that system, certain average schedule companies with high traffic volumes received settlements that were substantially above their costs of doing interstate business.

29. In this regard, the greatest problem with the ARPM schedules was that they could, and did, provide windfall settlements to carriers whose usage increased for reasons unrelated to their costs. At the time that the ARPM schedules were modified through studies of selected exchanges in the early 1970s, no resale of switched message traffic was permitted in the United States, and thus this anomaly had no significance. However, after the Commission's resale decision,[58] it became possible for interexchange carriers and resellers to route traffic through average schedule companies, with corresponding increases in the settlements those average schedule companies received.[59] Under the ARPM schedules, the compensation of an average schedule exchange carrier could grow without bound as its messages increased, without any increase in its actual costs.

30. A dramatic example of the mismatch between settlements and costs under ARPM methodology is the settlements that were received by the Northwest Iowa Telephone Company ("Northwest") of Sergeant Bluff, Iowa (an ICORE company). From 1979 to 1983, while Northwest's total unseparated telephone plant increased 12 percent, its annual toll revenues (which consisted in large part of interstate ARPM settlements) increased *1236* percent.[60] Between June and December 1984 alone, despite a roughly constant 3,200 access lines, Northwest received an increase in monthly interstate common line settlements from $1.1 million to $1.8 million.[61] In 1985, an affiliate of Northwest began to conduct telemarketing operations, further increasing Northwest's interstate message traffic.[62] By May, 1986, when Northwest reported not quite 3,400 access lines, its monthly interstate common line settlements had increased to $2.9 million.[63] Northwest's interstate monthly settlements under the ARPM schedules amounted to approximately $862 per line, as compared with a national average for companies of Northwest's size of $7 per line.[64] According to NECA, Northwest was receiving under the ARPM schedules settlements in excess of 1100 percent of its total (*i.e.*, intrastate *and* interstate) common line revenue requirements for that company.[65] In 1985, Northwest's total company

rate of return on equity was *209* percent,[66] compared to the 17.4 percent that was in effect during that period for cost companies.[67]

31. The drastic and rapid growth in non-cost-based settlements for some companies under the ARPM schedules counseled that these schedules be replaced quickly. The windfall settlements were highly inequitable, and their continuation held the potential for settlement losses by cost companies, who were paid by NECA only after all average schedule companies had been paid, or unnecessary increases in common line charges to consumers of interstate access. Any imperfections in the NECA methodology pale in comparison to the fundamental flaws in the ARPM approach.[68]

32. Finally, although the 1986 schedules were subject to certain "start-up problems," the problems "did not undermine the basic improvements in NECA's overall approach," and have largely been addressed in subsequent revisions to the average schedules that have not been appealed.[69] For example, NECA added a number of improvements to the 1989 schedules that replaced the 1986 schedules, including additional testing and analysis demonstrating the representativeness of the cost company sample underlying the schedules.[70]

B. ICORE's Proposed Cost Study Alternative Should be Rejected.

1. Positions at the Parties

33. On remand, ICORE again advocates a "full-scale cost study similar to that completed in the 1970's."[71] ICORE states that the average schedule companies to be studied should be identified through stratified probability sampling.

34. NECA responds that that full-scale cost studies could not have been completed in the relevant time period, because of the problems that were associated with divestiture, the first implementation of the Commission's access charge rules, disruptions that resulted from relocated or retired personnel, existing burdens upon exchange carriers and their personnel in adapting and responding to new access charge requirements and the divestiture of the Bell Operating Companies, and the lack of meaningful data that were available at that time.[72] NECA concludes that under these circumstances it "really had no viable alternative but to use the methodology it employed in the September 1985 revisions."[73]

2. Discussion

35. We reject ICORE's proposed "cost study" alternative because there is no evidence that NECA's method is unreasonable, and because ICORE's proposed alternative is inconsistent with our rules and would be unduly burdensome under the circumstances of this case. As discussed above, there are two basic approaches to formulating average schedules: NECA's process that focuses on the costs of cost companies that look like average schedule companies, and ICORE's "cost study" proposal that focuses on conducting cost studies for a sample of representative average schedule companies. ICORE has suggested no reason why NECA's "look alike" process, *per se*, should yield unreasonable results, and as discussed above, the cost company and average schedule data utilized by NECA reasonably "looked like" the universe of average schedule companies, and produced reasonable results.

36. In contrast, ICORE's proposed "cost study" alternative cannot be viewed as reasonable under the circumstances. First, although section 69.606(b) of the Commission's rules requires NECA to update average schedules annually or to certify that they do not need to be updated, the full-scale cost study alternative proposed by ICORE would take several years to complete. ICORE's initial comments in this proceeding state that the first (and only) time a similar undertaking was attempted, it took four years under substantially less complicated circumstances.[74] NECA estimated that it would take at least four years to implement ICORE's cost-study approach.[75] It would be unreasonable to require NECA to implement ICORE's cost study alternative when we have determined that NECA should make annual updates to the average schedules, and ICORE's cost study alternative requires a multi-year study each time it is done.

37. A full scale cost study also would have imposed significant administrative costs that, on balance, would not have been justified in light of the underlying purpose of the average schedule option, namely the need to avoid such costs. Even assuming reliable data could have been obtained, which NECA's affiants state would not have been possible, a full scale cost study approach would have imposed substantial data production requirements upon certain average schedule companies and NECA, further straining the use of their limited personnel. Cost studies, moreover, are expensive, with minimum cost estimates ranging from $2.8 million to $10 million.[76] Moreover, the continuing data production and cost burdens associated with keeping cost studies up to date conflicts with our broader objective of reducing administrative burdens on small telephone companies.[77] Finally, a four-year cost study is unreasonable in light of the fact that, as described at length above, the ARPM schedules were seriously outdated and were resulting in windfall settlements to a handful of average schedule companies.

C. NECA's Transition Plan Is Reasonable

1. Background

38. NECA decided that a transition was warranted for companies experiencing reduced settlements under the 1986 schedules, but determined that it would be unreasonable to sustain some of the most excessive settlements that had been received under the ARPM schedules. Accordingly, NECA proposed a "flash cut" under which average schedule companies (like cost companies) would not be allowed to recover more than 85 percent of their unseparated (*i.e.*, state and federal) common line revenue requirements from interstate common line settlements. Below the 85 percent cap, NECA proposed phasing in reductions under the new schedules by limiting the decreases in monthly payments during the next four years to a maximum of $1.25 per access line per year. NECA calculated that the 85 percent cap would apply at the equivalent of 15.9 interstate messages per access line per month.

39. On remand, the court upheld the "flash-cut," rejected ICORE's claim that it was "discriminatory" and observed "that some average schedule companies suffer greater reductions than cost companies . . . seems to us an indication that these average schedule companies had

been overrecovering to a greater extent than cost companies."[78] The only issue remanded by the court was whether the 15.9 messages per access line demarcation point was properly supported in light of the criticisms that ICORE had raised. The court noted that although NECA had estimated that a company would exceed the 85 percent cap at a level of 15.9 interstate messages per month, ten of the thirteen companies estimated by NECA to exceed the 85 percent cap actually had fewer than 15.9 messages per month. Conversely, the court noted that only three of six companies shown to have more than 15.9 messages per line per month exceeded the 85 percent cap. The court also concluded that "although NECA claimed in its reply comments that the 15.9 figure accurately classified 97% of average schedule companies, it points to no data to support this claim."[79]

2. Positions of the Parties

40. ICORE challenges virtually every aspect of NECA's estimate of 15.9 messages. ICORE again alleges that the 15.9 figure lacks credibility because ten of the thirteen companies estimated by NECA to exceed the 85 percent cap had fewer than 15.9 messages per month. ICORE also generally argues that NECA used incorrect statistical methodologies and non-representative data.[80] ICORE states that it is impossible to confirm the accuracy of NECA's calculations because NECA destroyed the demand data file through a computer data erasure, and accuses NECA of making misleading and incorrect claims with respect to NECA's estimation technique.

41. In response, NECA states that "an approach which correctly classifies 97 percent of average schedule companies is reasonable," and stresses that some inaccuracy in classification is inherent in any statistically based classification scheme.[81] NECA contends that the accidental erasure of the demand data file was not material since the erased data pertained to a single month and the accuracy of the data was confirmed on the basis of subsequent demand data.[82]

3. Discussion

42. We conclude that NECA's methodology for arriving at the 15.9 messages limit that was used for the flash-cut appears to be reasonable. However, NECA lacked the specific cost study data for each average schedule that would have allowed it to determine conclusively which average schedule companies were exceeding the 85 percent limit from which transition payments were to be calculated. Accordingly -- and in light of the unavoidable limitations on NECA's ability to implement an absolutely accurate surrogate for the 85 percent revenue recovery cap for cost companies, the substantial settlement reductions the flash-cut required of some companies, the small number of companies directly affected by the flash-cut, and the transitional nature of this relief -- we direct NECA to supplement its flash-cut methodology to provide additional protection to companies affected by the flash-cut. In particular, where a company subject to the flash-cut so chooses, NECA shall conduct an interstate cost study and use that data to determine where to begin the ARPM transition, and shall adjust settlements on the basis of that determination.[83] If NECA finds that such a company recovered less than 85 percent of that company's NTS costs from interstate settlements, NECA will adjust the settlements to produce a new starting point for 85 percent NTS recovery.[84] This approach will ensure that none of the individual companies subject to the flash-cut is harmed by the limitations on the data available to NECA when it developed the 15.9 messages/access line methodology.[85]

IV. APPLICATION OF THE 1986 SCHEDULES BETWEEN JUNE 1, 1986, AND MARCH 31, 1989 WAS VALID AND SHOULD NOT BE RETROACTIVELY DISTURBED

A. Positions of the Parties

43. ICORE contends that even if the Commission affirms the 1986 schedules on remand, we may not "retroactively" apply them to average schedule companies. Specifically, ICORE states that the *City of Brookings* court found that the Commission had unlawfully promulgated the 1986 schedules, and that the Administrative Procedure Act (APA) requires vacation and replacement of the 1986 schedules with the ARPM schedules that had been in effect.[86] Regardless of what this Commission decides on remand, ICORE contends that we must grant average schedule companies the option of recovering settlements under the ARPM schedules for the period during which the 1986 schedules were in effect.[87]

44. NECA replies that ICORE's argument for retroactive application of the ARPM schedules "flies in the face of the *City of Brookings* decision," which clearly stated that the court did not vacate the Commission's approval of the 1986 revisions pending remand.[88] NECA states that the *City of Brookings* court had clear authority to allow the application of the 1986 revisions pending remand,[89] and that the cases cited by ICORE as authority for retroactive application of the ARPM schedules are inapposite because those cases involve situations in which reviewing courts specifically vacated proposed modifications pending remand.[90]

B. Discussion

45. ICORE's claim that average schedule companies are entitled to adjustments of their settlements even if this Commission reaffirms the 1986 revisions on remand is inconsistent with the *City of Brookings* decision, relevant case law, and compelling public interest considerations. The court in *City of Brookings* expressly rejected ICORE's request that it vacate the 1986 schedules pending remand. Specifically, the court found that reimposition of the ARPM Schedules "at this late stage would disrupt the settlement process and would, among other things, cause economic hardship to many companies that are not parties to the petition for review."[91] The court declined to order "the reassessment of settlement payments," leaving to the Commission's judgment in the first instance "how best to accommodate [the] various interests in light of the proceeding on remand."[92]

46. Beyond mischaracterizing the mandate in the *City of Brookings*, ICORE's cites inapposite case law suggesting that the court, and this Commission, are required to apply the ARPM schedules. In the cases cited by ICORE, the courts had exercised their discretion to vacate proposed rules pending remand, and the preexisting rules were reinstated to fill the void.[93] In contrast, when a court finds that agency action has run afoul of the APA, it may exercise discretion to allow the agency action to remain in effect pending the agency decision on remand.[94] That is what the court did in this case.

47. Compelling public interest reasons also counsel against applying the ARPM schedules retroactively. First, the *City of Brookings* court refused to impose schedules in 1987 pending remand, finding that to do so would be unduly disruptive of the settlement process. Now four years later, the retroactive modification requested by ICORE would cause even greater disruption. Second, the Commission has found once again that the ARPM schedules had serious methodological flaws and that the 1986 schedules are consistent with applicable Commission rules. It would make no sense to order recalculation of settlements for this past period, requiring the payment of settlements based upon the obsolete ARPM schedules that are inferior to the 1986 schedules. Third, such a step would be expensive to implement, would disadvantage other exchange carriers,[95] and would perpetuate the obvious windfall settlements that some exchange carriers had received. In sum, ICORE is requesting retroactive payments that are not required by the *City of Brookings* mandate or by applicable precedent, and that would be inconsistent with the public interest.

V. ORDERING CLAUSES

48. ACCORDINGLY, IT IS ORDERED THAT the Commission's April 11, 1986 approval of NECA's average schedule formula IS REAFFIRMED AS MODIFIED HEREIN;

49. IT IS FURTHER ORDERED THAT NECA shall perform cost studies and make the settlements adjustments that are appropriate in light of those studies AS SPECIFIED HEREIN;

50. IT IS FURTHER ORDERED THAT NECA shall promptly transmit to the Secretary, Federal Communications Commission, the name and address of each exchange carrier that may properly elect to be cost studied by NECA pursuant to this order;

51. IT IS FURTHER ORDERED THAT the Secretary shall, by registered mail, return receipt requested, transmit a certified copy of this order to each exchange carrier identified in response to the preceeding requirement;

52. IT IS FURTHER ORDERED THAT the motions of all parties to this proceeding are granted to the extent stated herein and otherwise are, in all respects, denied;

53. IT IS FURTHER ORDERED THAT the Secretary shall cause a summary of this Memorandum Opinion and Order to be published in the *Federal Register*.

54. IT IS FURTHERED ORDERED THAT this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *City of Brookings Municipal Telephone Company v. FCC*, 822 F.2d 1153 (1987) ("*City of Brookings*").

[2] The 1986 Schedules were proposed by NECA on September 17, 1985, and approved by the Commission with minor revisions on April 11, 1986. *See MTS and WATS Market Structure: Matter of Average Schedule Companies*, 103 FCC 2d 1017, *recon. granted in part, denied in part*, 3 FCC Rcd 834 (1986).("*Reconsideration Order*"). The 1986 Schedules were replaced by revised schedules on April 1, 1989. *See Revisions to the Average Schedules Proposed by NECA on October 3, 1988*, 4 FCC Rcd 2804 (Com. Car. Bur. 1989).

[3] 47 C.F.R. § 69.606(a) (1987).

[4] *See* Letter from Mr. W. R. Stump, Assistant Vice President - AT&T, to Chief, Common Carrier Bureau, dated June 30, 1983, proposing average schedule guidelines with an effective date of January 1, 1984. Prior to divestiture, AT&T had compensated LECs that did not perform cost studies on the basis of average schedule guidelines negotiated between AT&T and the LECs without Commission oversight.

[5] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, FCC 83-509 (released Nov. 14, 1983).

[6] Section 69.606(a) of the Commission's rules requires that disbursements to average schedule companies be approved by the Commission. 47 C.F.R. § 69.606(a) (1984).

[7] During 1983, AT&T's General Department (*i.e.*, that portion of AT&T that managed the Bell Operating Companies and their settlement procedures) was in the process of being dissolved and its personnel dispersed as part of the divestiture process. *See generally United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[8] Modification of Average Schedules, dated September 16, 1985, (filed Sept. 17, 1985) attached to transmittal letter from Mr. G. R. Evans, NECA Director - Tariff and Regulatory Matters to the Chief, Common Carrier Bureau ("Proposed 1986 Revisions"). NECA failed to meet its deadline under our rules to submit an annual revision to the schedules in 1984, or to certify by November 1984 that no revisions were warranted.

[9] After January 1, 1986, no cost companies were compensated on a traffic sensitive basis for NTS costs. 47 C.F.R. § 67.124 (1984). Prior to 1986, cost companies were limited to recovering 85% of their NTS costs from the interstate jurisdiction.

[10] Proposed 1986 Revisions at 1-2.

[11] *Id.* at 3.

[12] *See* 47 C.F.R. § 67.1 *et seq.* (1983, 1984, 1985).

[13] Proposed 1986 Revisions at 3.

[14] *Id.*

[15] Comments of the ICORE Local Exchange Companies on the Proposed Revisions to the Average Schedule Formulas (filed Dec. 6, 1985).

[16] *See* n.2, *supra*.

[17] *City of Brookings*, 822 F.2d at 1171.

[18] *Id.* at 1171-72. The court concluded that the order had failed to respond sufficiently to claims in the record regarding certain defects in NECA's data, calculations, and methods. The court did observe, however, that it "would face a much different situation as a reviewing court if, besides acknowledging these shortcomings frankly, the Commission had explained why these were merely start-up problems resolvable in future revisions and did not undermine the basic improvements in NECA's overall approach." *Id.* at 1168.

[19] *Id.* at 1169, 1171.

[20] *Id.* at 1171.

[21] Letter from the Chief, Common Carrier Bureau, to Mr. Bruce Baldwin, President, National Exchange Carrier Association, Inc. (Aug. 11, 1987).

[22] On May 13, 1988, NECA filed a motion seeking permission to file a supplemental reply, stating that ICORE had filed supplemental comments that exceeded the scope of the comments that had been authorized at 3 FCC Rcd 1477. ICORE did not oppose this motion. On October 13, 1989, NTCA filed supplemental comments and a motion seeking to have its supplemental comments and attachments included in the record of this proceeding. On November 8, 1989, ICORE filed a motion seeking inclusion of supplemental comments in response to NTCA's October 13, 1989 filing. In this Order, we grant NECA's, NTCA's, and ICORE's motions and include NECA's and NTCA's supplemental comments and attachments and ICORE's supplemental comments in the record of this proceeding.

[23] *See generally City of Brookings*, 822 F.2d at 1165-6.

[24] For example, assume that data for average schedule company X showed it to have total costs of 100. Assume also that NECA had determined (in its Step 1 calculation, described above) that access category 1 contained 10% of the costs of the 255 cost companies that it had studied. NECA could then estimate average schedule company X's revenue requirement for category 1 by multiplying the allocation factor for category 1 (10% or .10) by Company X's total costs of 100.

[25] NECA's actual formula was more complex. For companies with lines per exchange ratios that were greater than, or equal to, 417.48, the settlement per line was $8.064526. For companies with lines per exchange ratios less than 417.48, the settlement per line was $16.129052 - (.019317)(Lines/Exchanges). *See* NECA Proposed 1986 Revisions, Appendix A at 14.

[26] ICORE Comments (Jan. 5, 1988) at 30.

[27] *Id.* at 34.

[28] *Id.* at 32-33.

[29] *Id.* at 37.

[30] *Id.* at 43.

[31] *Id.* at 45-47.

[32] *Id.* at 47-49.

[33] *Id.* at 49-52.

[34] ICORE Comments (Jan. 5, 1988), ICORE Reply (March 4, 1988), ICORE Supplemental Comments (April 4, 1988), *passim.* ICORE stresses that NECA should have used exchange data, rather than company data.

[35] ICORE Comments (Jan. 5, 1988) at 3.

[36] *See id.* at 5.

[37] On remand, all parties except ICORE oppose a return to the ARPM methodology. *See* NTCA Comments (Jan. 5, 1988), National Rural Telecom Association Reply Comments (March 4, 1988), USTA Reply Comments (March 4, 1988), NTCA Reply Comments (March 4, 1988), Reply Comments of OPASTCO (March 4, 1988), NECA Reply (March 4, 1988), NTCA Further Reply (April 4, 1988), NECA Supplemental Reply (May 13, 1988).

[38] NECA Reply (March 4, 1988) at ii, 2-8, Appendices A, D-G; NECA Supplemental Comments (May 13, 1988) at i-9; OPATSCO Reply (March 4, 1988) at 2-3; USTA Reply Comments (March 4, 1988) at 4-5.

[39] NECA Reply (March 4, 1988) at 33-34, n. 62.

[40] ICORE opposed the disclosure of information concerning whether excessive compensation had been received by average schedule companies under the ARPM methodology. *See generally* NTCA Motion for Release of Data (Mar. 18, 1988); Opposition of the ICORE Local Exchange Companies to NTCA's Motion for Release of DATA (Mar. 31, 1988); NTCA Response To Opposition Of The ICORE Local Exchange Companies to NTCA's Motion for Release of Data (Apr. 12, 1988); Memorandum Opinion and Order, DA 88-1426 (Sept. 20, 1988); ICORE Petition For Reconsideration Regarding Release of NECA Data (Oct. 20, 1988).

[41] NTCA Comments (Jan. 5, 1988) at 6-7, n. 9.

[42] *Id.* at 11.

[43] Data that NECA filed in this proceeding on November 18, 1985 (City of Brookings Joint Appendix at 400-1158) for cost and average schedule companies appear to be adequately representative for the purpose of computing average schedule interstate revenue requirements when compared with company specific data that were filed for the purposes of the Federal-State Joint Board Staff monitoring reports in CC Docket No. 87-339. In addition, affidavits from NECA's statistical experts and representatives of average schedule companies and USTA also support the conclusion that NECA's data choices were representative of average schedule company cost characteristics. *See* City of Brookings Joint Appendix at 400-1159; Federal-State Joint Board Staff Monitoring Reports in CC Docket No. 87-339 (September and December 1988 Reports)[company data for loops, unseparated revenue requirements, cost per loop, and interstate subscriber plant factors]; (NECA Reply (Mar. 4, 1988), Appendices A-C, E-G; NECA Supplemental Comments (May 13, 1988), Appendix B. *See also* Appendix hereto, nn. 40, 83, 117 (ICORE's affiant is not credible).

[44] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 17-2, 9-1 to 9-6; NECA Reply (Mar. 4, 1988), Appendices A, B, D, E, G.

[45] NECA Reply (Mar. 4, 1988) at 69-71. (736 - 476 - 5 = 255).

[46] *See* Affidavit of Mr. Stephen Quinnan, NECA Reply (Mar. 4, 1988), Appendix A at 28; NECA Information Response at Question 16.

[47] In 1986, the unseparated NTS revenue requirement was $231.57 per access line per year, or $19.30 per access line per month. *See* Federal-State Joint Board Staff Monitoring Report in CC Docket No. 87-339 (Sept., 1988) at 81. On a nationwide average basis, the "frozen SPF" separations allocator placed 28 percent of the unseparated revenue requirement into the interstate jurisdiction. ($19.30 x .28 = $5.40)

[48] NECA Reply (March 4, 1988) at 84-85. ICORE also criticizes NECA for not performing adequate "stratifications," as part of ICORE's more generalized attacks on NECA's data set development techniques that did not include probability sampling. NECA had, in fact, performed extensive stratification testing that did not indicate that superior results would be achieved through stratified techniques. *See, e.g., id.*, Appendices A-C; NECA Supplemental Comments (May 13, 1988) at Appendix B. Having concluded that improved results would be unlikely, NECA reasonably chose not to employ such techniques.

[49] NECA Information Response at 19-3.

[50] *See* Affidavit of Dr. Robert A. Koyak, Assistant Professor in the Department of Mathematical Sciences at Johns Hopkins University, NECA Reply (March 4, 1988) Appendix B.

[51] *1985 Proposed Revisions* at 9-13, 17, 21; NECA Reply (Jan. 6, 1986) at i, 2, 5 n.6, 22-24, 27; NECA Reply (Mar. 4, 1988) at i, iii, 11-14, 109-110; NECA Supplemental Comments (May 13, 1988) at 12.

[52] *See, e.g., 1985 Proposed Revisions* at 15-16, 21, Appendix A at 1-5; *City of Brookings* Joint Appendix at 402-1158; NECA Reply (Jan. 6, 1986) at ii, 4, 13-17; NECA Reply (Mar.4, 1988) at 13-14, 45-46, 68-93; NECA Supplemental Comments (May 13, 1988) at 33.

[53] *1985 Proposed Revisions* at 1, 3, 15-16, Appendix A at 1-4; NECA Reply (Jan. 6, 1986) at ii; NECA Reply (Mar.4, 1988) at 13-14, 53-59, 68-78, 103 n.197.

[54] *1985 Proposed Revisions* at 11, 21, Appendix A at 9-10, 18; NECA Reply (Mar. 4, 1988) at 14 n.37, 45, 109-110.

[55] *See, e.g., 1985 Proposed Revisions* at 1, 3-16, 21-22, Appendix A at 3-9; NECA Reply (Jan. 6, 1986) at ii, 22-24; NECA Reply (Mar. 4, 1988) at iii, 4-7, 11-14, 94-99; NECA Supplemental Comments (May 13, 1988) at 3 n.4, 26-30.

[56] ICORE's challenges to the data that NECA employed and ICORE's arguments concerning probability sampling, model development, testing, and other technical criticisms are discussed in detail in the Appendix to this Order.

[57] NECA has refined the data and methodologies that were used in subsequent revisions to the average schedules. *See* NECA Proposed Revisions To The Average Schedules, 4 FCC Rcd 2804 (1989), 5 FCC Rcd 4068 (1990).

[58] *See Resale and Shared Use*, 60 FCC 2d 261 (1976); *recon* 62 FCC 2d 588 (1977); *aff'd sub nom. AT & T v. FCC*, 572 F.2d 17 (2nd Cir. 1978), *cert denied*, 439 U.S. 875 (1978); *Policy and Rules Concerning Rates for Competiive Common Carrier Services and Facilities Authorizations Therefor*, Second Report and Order in CC Docket No. 79-252, 91 FCC 2d 59 (1982), *recon.* 93 FCC 2d 54 (1983); Fourth Report and Order in CC Docket No. 79-252, 95 FCC 2d 554 (1983).

[59] NTCA Comments (Jan. 5, 1988) at 6-8; NTCA Comments (Mar. 4, 1988) at 10-12; NTCA Further Reply (Apr. 4, 1988) at 1-4. *See also* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at questions 4, 32-34; NECA Reply (Mar. 4, 1988), Appendix D at 5-6.

[60] NTCA Reply Comments (Nov. 22, 1989) at 2-3 (citing data that Northwest has filed with the Rural Electrification Administration).

[61] NECA Average Schedule Information Request Response (Sept. 15, 1987) at 32-17.

[62] *See* written *ex parte* statement from NTCA to the Secretary, FCC, dated May 17, 1990 (containing a photostat of an article that appeared in the *Des Moines (Iowa) Sunday Register* on April 8, 1990).

[63] *See* NECA Average Schedule Information Request Response (Sept. 15, 1987) at 32-17; Opposition to Petition for Stay of NTCA (Oct. 27, 1988) at n. 18 (referencing an attached letter from Mr. Joe Naset, NECA Vice President-Industry Relations, to Mr. James J. McKenna, President, Northwest Iowa Telelphone Company, dated April 13, 1989 ("Naset Letter")).

[64] Naset Letter at n. 1.

[65] *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at question 4; NTCA Comments (Jan. 5, 1988) at 6-8.

[66] Telephone Annual Report of Northwest Iowa Telephone Company (filed June 3, 1986 with the IOWA Commerce Commission and Department of Revenue) at B-6, B-11 (Net income of $6,890,000 divided by common stock equity of $3,290,424).

[67] *See AT&T Petition for Modification of Prescribed Rate of Return*, 86 FCC 2d 221, 247 (1981), *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 315-6 (1983).

[68] Contrary to ICORE's assertions, the 1983 schedules filing did not contain supporting cost data, demand data, and information with respect to the statistical sampling, if any, that had been employed to determine the basis for those average schedule revisions. Moreover, the ARPM schedules took no account of changes to the Commission's Part 69 access charge rules, or the Commission's Part 67 separation rules, despite the fact that these changes affected the costs of average schedule companies. *See* NECA Reply (Mar. 4, 1988) at 4.

[69] *See City of Brookings*, 822 F.2d at 1168.

[70] *See Revisions to the Average Schedules Proposed by NECA on October 3, 1988, supra*, n.2. *See also NECA's Proposed Revisions To The Average Schedules*, 5 FCC Rcd 4068 (1990). ICORE did not seek Commission review of these orders.

[71] ICORE Supplemental Comments (Apr. 4, 1988) at 41. *City of Brookings*, 822 F.2d at 1169-70. ICORE raises some new alternatives that it states we must consider. *See generally* ICORE Comments (Jan. 5, 1989) at 53-54; ICORE Supplemental Comments (April 4, 1988) at i-11, 40, 41-43. We find these new claims to be beyond the scope of the court's remand. *See City of Brookings*, 822 F.2d at 1169-71; *Northwestern Indiana Telephone Co., and Northwest Indiana CATV, Inc. v. FCC*, 872 F.2d 465, 470-71 (D.C. Cir. 1989).

[72] NECA Supplemental Comments (May 13, 1988) at 30; NECA Reply (Mar. 4, 1988) at Appendices A, D-G.

[73] NECA Reply (Mar. 4, 1988) at 105.

[74] ICORE Comments (Dec. 6, 1985), Ex. B at 3.

[75] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 35-25.

[76] *Id.* at Tab 35, Ex. 35B, 35C.

[77] These burdens would have been especially high in 1983-1985, when the changes brought about by divestiture had caused considerable disruption and strained resources.

[78] *City of Brookings*, 822 F.2d at 1170.

[79] *Id.* at 1171.

[80] For instance, ICORE states that in developing its estimation techniques, NECA utilized "faulty cost and average schedule company data," to which it applied "wholly meaningless allocation factors," and then performed an "unsound" regression analysis upon the resulting data. ICORE Comments (Jan. 5, 1988) at 23.

[81] NECA Reply (Mar. 4, 1988) at 60.

[82] NECA's Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 5, 26, 27, 30. NECA also observes that the Commission had provided a safety-valve, by waiver, from the flash- cut "upon an adequate showing that the company had not in fact been recovering more than 85% of its total NTS costs from interstate cost settlements under the ARPM-based schedules." NECA notes that only one exchange carrier (the Jefferson Telephone Company) subject to the flash-cut attempted to show that its NTS recovery ratio was in fact less than 85% under the ARPM schedules. NECA asserts that ICORE's claims that the 15.9 figure led to severe losses for flash-cut companies is belied by the fact that only one company attempted to show that the 85% cut-off was incorrectly applied to it. NECA Reply (Mar. 4, 1988) at 57-58.

[83] The studies shall be performed by NECA for each settlement period from June 1986 through March 1989 (for those companies that did not elect to continue under the May 31, 1986 settlement schedules through July 31, 1986), or from August 1986 through March 1989 (for those companies that elected to continue under the old schedules until July 31, 1986). *See generally Reconsideration Order* at 839-40 (1986). In imposing this requirement, we recognize that it may be necessary to estimate certain measurements for past periods, and impute values if data are not available or are missing. To minimize potential errors of estimation, we direct all exchange carriers

(including the employees, officers, agents, and affiliates of such carriers) that elect to take advantage of this option to provide all data, information, and documentation that may be required for the completion and evaluation of the requisite cost studies. The expenses of these studies shall be recovered from the interstate revenue pools that NECA administered during the periods covered by these studies.

[84] Of course, NECA will also make appropriate settlement reductions if it finds that a company started its transition at a level greater than 85 percent of its NTS costs.

[85] Each company electing this option shall notify NECA of its election within 90 days of the release of this order. If any exchange carrier so studied is dissatisfied with NECA's studies or NECA's proposed settlements adjustment, it may, of course, document the basis for its dissatisfaction and file a petition for appropriate relief with this Commission.

[86] ICORE Comments at 12-13.

[87] *Id.* at 17. This conclusion is premised upon the contention that our approval of the 1986 schedules was invalid, and that the court vacated that approval.

[88] NECA Reply (Mar. 4, 1988) at 25-26.

[89] *Id.* at 26-41, citing *Camp v. Pitts,* 411 U.S. 138 (1973); *Mid-Tex Electric Cooperative, Inc. v. FERC,* 822 F.2d 1123 (D.C. Cir 1987); *Western Oil & Gas Association v. EPA,* 633 F.2d 803 (9th Cir. 1980); *Rodway v. Department of Agriculture,* 514 F.2d 809 (D.C. Cir. 1975); *Indiana & Michigan Electric Co. v, FPC,* 502 F.2d 336 (D.C. Cir. 1974), *cert. denied,* 420 U.S. 946 (1975).

[90] NECA Reply (Mar. 4, 1988) at 41-44.

[91] *City of Brookings,* 822 F.2d at 1171-2. Under ICORE's interpretation of the *City of Brookings* decision, the court allowed interim application of the 1986 schedules during the remand period despite the fact that, as a matter of law, the ARPM schedules must be retroactively applied. Under this interpretation, the Court inexplicably ensured that millions of dollars would be paid out under inapplicable schedules, and necessitated a massive, retroactive modification of settlements pursuant to the ARPM Schedules, rather than imposing the APRM schedules in the *City of Brookings* decision, and avoiding the need for retroactive modification. We do not think the court would have made this decision if application of the old schedules was legally compelled, as ICORE insists.

[92] *Id.*

[93] *Georgetown University Hospital v. Bowen,* 821 F.2d 750, 757 (D.C. Cir. 1987); *aff'd.,* 485 U.S. 903 (1988); *Abington Memorial Hospital v. Heckler,* 750 F.2d 242, 244 (3rd Cir. 1984), *cert. denied,* 106 S. Ct. 180 (1985); *Action on Smoking & Health v. CAB,* 713 F.2d 795, 797 (D.C. Cir. 1983).

[94] *See, e.g., Western Oil & Gas v. EPA,* 633 F.2d 803, 813 (9th Cir. 1980); *Rodway v. USDA,* 514 F.2d 809, 817 (D.C. Cir. 1975).

[95] NECA estimates that a return to the ARPM schedules would involve a loss to the common line pool of $77 million or more. NECA Reply (March 4, 1988) at 106, n.199.

APPENDIX

1. During the course of this proceeding, ICORE provided detailed technical criticisms that were directed to aspects of NECA's data choices, the computations that NECA employed, the statistics and statistical tests that NECA utilized, and the formulas that NECA tested in developing the revisions to the average schedules that NECA proposed. This Appendix discusses the principal criticisms that have been raised with respect to the manner in which NECA developed the average schedules that became effective June 1, 1986.

a. NECA's Average Schedule Company And Cost Company Data Choices

1. Comments

2. First, ICORE contends that since probability samples and tests are a prerequisite for determining whether data are representative of average schedule companies, and NECA did not use such samples and tests, NECA's data are not representative of average schedule companies.[1] Second, ICORE argues that NECA excluded companies that were contained in its average schedule company and cost company data bases in an inconsistent manner.[2] Third, even if one ignores the fact that NECA's data bases were not derived from probability samples, ICORE maintains that the data that NECA chose were not representative of the characteristics of average schedule companies.[3] As a consequence, ICORE concludes that none of the final data choices[4] that NECA employed are representative of average schedule companies.[5] This leads ICORE to conclude that NECA's proposed revisions cannot be viewed as being in compliance with Section 69.606(a) of our rules.[6] ICORE also asserts that NECA used substantially different screening techniques in reducing the total number of average schedule companies to arrive at the universe that NECA employed in developing its revisions to the average schedules than it used in reducing the cost company data set.[7] ICORE describes this as follows:

> [w]hile 191 cost companies were excluded for data errors or omissions, and 285 were excluded for insufficient data, only seventeen of the 489 available average schedule companies were so excluded. Indeed, many average schedule companies were left in the sample despite data flaws identical to those which disqualified cost companies. [8]

[1] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 18-19, 27-46, Exhibits A, B and references cited therein; ICORE Reply (Apr. 4, 1988) at 13-15, 24-35, Exhibits B, C and references cited therein. This criticism is addressed in the main body of this order at III.A.2.

[2] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 29-35, 44-45; ICORE Reply (Apr. 4, 1988) at 28, 33-34.

[3] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 35-36, Appendix B (letter from Mr. Coo) at 6, 11; ICORE Comments (Apr. 4, 1989) at 33-34, Exhibit E at 3.

[4] NECA's choices with respect to demand data are discussed separately in the next two sections.

[5] *See, e.g.,* ICORE Comments (Dec. 6, 1985) at 21-22, 24; ICORE Reply Comments (Jan. 6, 1986), Exhibit 2-4; ICORE Comments (Jan. 5, 1988) at 25-36, 42-47, Exhibits A-C; ICORE Reply (Apr. 4, 1988) at 19, 24-30, 32-33, 36-37, 40, Exhibit B at 5-12, Exhibit C at 6-10.

[6] *See, e.g.,* ICORE Comments (Jan. 5, 1988), Ex. A at 33-35.

[7] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 44.

[8] *Id.* at 45.

3. In response, NECA states that ICORE's comparison is "irrelevant because the purposes for which the cost company and average schedule company data were utilized were different. The average schedule company data base was used to provide only total company financial data whereas it was necessary for the cost companies in NECA's ICAS universe to exhibit both total company cost data"[9] and "interstate access element data."[10] As a consequence, it "is not surprising that a greater proportion of cost companies than average schedule companies were excluded during the screening process."[11]

4. ICORE also contends that the average schedule company and cost company data set that NECA employed were demonstrably flawed, and therefore not representative of the universe of average schedule companies. ICORE identifies four examples related to NECA's efforts to refine the cost company sample to a group reasonably indicative of average schedule companies for the purpose of developing the cost allocation factors.[12] First, NECA excluded from its cost company data base those cost companies that did not have complete "long form" (*i.e.*, detailed) ICAS cost data. In ICORE's view, such an exclusion necessarily biased the characteristics of the cost allocation factors that NECA computed from its cost company datasince small cost companies would have been more likely to have completed the ICAS short form, rather than the ICAS long form.[13] Second, ICORE observes that NECA's stated size limit of 210,000 access lines in its universe of cost company data inclusion was "far beyond the size of any average schedule company."[14] ICORE complains that NECA only excluded a total of five cost companies from the ICAS data base for being too large.[15] Third, examination of the companies that were contained in NECA's universe of cost companies data base reveals several companies that in ICORE's view "cannot be deemed representative of average schedule companies."[16] For example, ICORE states that NECA's cost company data base included Central Telephone of Florida (200,000 access lines), the Puerto Rico Communications Authority, and Vista-United Telecommunications (the local exchange carrier serving Disney World," with fewer than 2,500 access lines but almost $34,000,000 in total investment).[17] And fourth, ICORE claims that in its supplemental data submission, NECA "admit(s) that '[t]he mean values for [the average schedule company] sample are somewhat larger than the mean values for the universe."[18] More specifically, the mean of the sample exceeded the mean of the universe by: 30.9 percent for interstate messages, 28 percent for interstate messages per exchange, 33.5 percent for access lines, and 21 percent for access lines per exchange.[19]

5. In response to these charges, NECA states that cost companies that had not completed the ICAS long form were excluded because long form data were necessary for computing access allocation factors.[20] NECA states that it was forced to exclude the ICAS short form cost companies because "it would have been mathematically impossible to derive allocation ratios in cases where half the data needed for the ratios is unavailable."[21] NECA also contends that ICORE's assertion that ICAS short form companies were smaller cost companies "who would most likely resemble average schedule companies" was without foundation since ICORE did not demonstrate that ICAS short form companies "are more likely typical of average schedule companies."[22]

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[9] NECA Reply (Mar. 4, 1988) at 85. ["The purpose of the cost company sample was to develop allocation factors representing the ratio of each interstate access element amount to each total company amount.... On the other hand, NECA's decision not to exclude 39 average schedule companies for having no total company traffic expense does not represent an inconsistency or flaw as ICORE suggests. As ICORE is well aware, average schedule companies were not required to provide *both* total company and interstate cost data from which to derive allocation factors."] NECA also noted that average schedule companies may not always "maintain records in sufficient detail to separately identify traffic expenses from other expenses such as commercial expense. In many cases, a single employee may perform many functions and the employee's labor costs and other expenses may be assigned to a single expense account." *Id.* at 76, n. 139. As a consequence, NECA explains that ICORE's argument "that cost company and average schedule company data should have been excluded from the samples for 'consistent' reasons fails to consider that the data were used for different purposes." *Id.* at 77.

[10] NECA Reply (Mar. 4, 1988) at 85-86.

[11] *Id.* at 86. ICORE also appears to call into question whether NECA's representations as to its actual average schedule development process are credible. Specifically, it claims that "[e]very time NECA explains how it arrived at a 255 cost company sample, the explanation is different." ICORE Comments (Jan. 5, 1988) at 29. ICORE claims that NECA's "inability to explain consistently how it reached 255 companies sheds considerable doubt on the accuracy of its post-hoc reconstructions of how the average schedules were created." *Id.* In response, NECA states that its descriptions are not, and were not, inconsistent. As one example, NECA states that where ICORE quoted a reference in one NECA filing to "784 cost companies" and claimed that "this contradicts a reference in another NECA filing to '736 independent cost study areas'," ICORE "overlooked the word 'independent.'736 *independent* cost company study areas plus 48 *Bell* study areas equals 784 total cost study areas." NECA Reply (Mar. 4, 1988) at 69-70. From the 736 independent cost company study areas, NECA then proceeded to construct a table to demonstrate that, contrary to ICORE's assertions, all of its descriptions as to how it arrived at its universe of 255 cost companies, were identical. *Id.* at 71.

[12] ICORE Comments (Jan. 5, 1988) at 30-31. ICORE also contends that because NECA did not use stratified sampling techniques, and did not examine exchange level data, that NECA's data choices are necessarily, and fatally, flawed. *See, e.g., id.* at 27-47. These related contentions are considered in other parts of this order in the contexts of probability sampling and the lack of availability of exchange level data.

[13] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 30-31.

[14] *Id.* at 31. According to Mr. Reimers: " [t]here is. .. only *one* average schedule company as large as 149,000 access lines, two at about 102,000 and 113,000 access lines (both of which will be cost at January 1, 1988) another at about 75,000, one at about 47,000, 8 in the 30,000 range, and only 34 between 10,000 and 30,000. The average is about 3,600 access lines." *Id.*

[15] *See, e.g.,* ICORE Comments (Jan. 5, 1988) at 30.

[16] *Id.* at 31.

[17] *Id.* at 31-32. *But see* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 9-6 [Puerto Rico Communications Authority was excluded for violating one of the four screening criteria; *see id.* at 10, NECA Reply (Mar. 4, 1988) at 71, n. 125.]

[18] *Id.* at 43-44.

[19] *Id.* at 44. *But see* NECA Reply (Mar. 4, 1988) at 85.

[20] *See, e.g.,* NECA Reply (Mar. 4, 1988) at 76.

[21] *Id.* at 76.

[22] *Id.* at 71-72, n. 125.

6. According to NECA, ICORE is incorrect in stating that only five cost companies were excluded for being too large.[23] In actuality, "all 48 Bell Operating Company study areas as well as many Independent Company study areas were excluded for this reason." NECA states that the five companies that ICORE referenced as having been the only companies that were excluded for size were, in fact, the only companies that were excluded for that reason alone.[24] Many other cost companies were, however, excluded for combinations of factors that *included* size.[25] NECA explains that the 210,000 access line per company limit had been "the maximum value reported by any average schedule study area in the October 1982 joint USITA-AT&T survey of independent companies",[26] that the limit had been recommended by the Average Schedule Task Force that advised NECA on the revisions;[27] and that the limit had been used in prior average schedule revisions.[28] More generally, NECA explained that company size had been determined, on the basis of extensive statistical tests not to be statistically significant with respect to the ratios (*i.e.*, access element allocation factors) that were computed from the cost company universe.[29] As a consequence, including companies "as large as 210,000 lines [which, of course, also included Central of Florida as well as Vista-United Telecommunications] did not distort the accuracy of the allocation factors,"[30] an observation that NECA extended generally to ICORE's criticisms of NECA's size limits.[31] In NECA's view, ICORE "is merely attempting to confuse a known relationship (between study area size and NTS costs) with a possible relationship between size and the percentage of NTS cost which may be assigned to each access element in a cost study."[32] In any event, NECA stated that the use of more restrictive size limits "would have resulted in the exclusion of additional companies without materially altering the allocation factors derived from this data base.[33]

2. Discussion

7. We believe that the data utilized by NECA, as the basis for a proposed revision to the average schedules, should be determined on the basis of methodologies and judgments that are, within the natural limits of time, timeliness, data and resource availability, the most appropriate possible. In considering this fundamental issue, we have again concluded that the data that NECA chose as the basis for those revisions represented the best cost and average schedule data that could reasonably have been expected to be representative of the universe of average schedule companies at that time.[34] To understand the basis for this conclusion, it is helpful to examine the concepts that have been advanced by ICORE in the context of this proceeding and compare those concepts with the data and time limitations that constrained the possible courses of action that could be pursued by NECA.

8. The thrust of ICORE's arguments is that the data that were employed by NECA were not representative of the universe of average schedule companies. ICORE supports this contention at two levels - first, that NECA did not utilize random (or stratified random) sampling to determine which companies' data would comprise the

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] NECA Reply (Mar. 4, 1988) at 73. NECA's reply refers to NECA's Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 9, 10. Although not mentioned by NECA in its reply, NECA had excluded both the Puerto Rico Communications Authority and the Puerto Rico Telephone Company from its cost company universe. NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 9-6; NECA Reply (Mar. 4, 1988) at 71, n. 125.

[27] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 10-1 to 10-2. The Average Schedule Task Force consisted of representatives from NTCA, OPASTCO, USTA, and NECA. NECA's Modification of Average Schedules (Sept. 17, 1985) at 2.

[28] NECA Reply (Mar. 4, 1988) at 73.

[29] *Id.* at 72-73. In this regard NECA observed at n. 126 that "[d]etailed studies, documented by NECA (Information Response at 28-2 through 28-5), demonstrate that size and percentage variables do not exhibit significant statistical relationships." *See* Affidavit of Mr. Stephen Quinnan, *id.* at Appendix A.

[30] NECA Reply (Mar. 4, 1988) at 72-73.

[31] With respect to ICORE's concerns, NECA states: (1) that there were actually four different quantitative screening tests employed (total company access lines, average access lines per exchange, monthly company interstate message volumes, and monthly company intrastate message volumes), not one; (2) as noted above, the 210,000 access line limit corresponded to the largest average schedule company present in the 1982 USITA/AT&T survey (*see* NECA's Average Schedule Information Request Responses, Sept. 15, 1987, at 10-1, 10-2, 16-2 to 16-13); (3) testing of the properties of the allocation ratios of the companies remaining in the ICAS sample did not indicate that those variations were significant. *See* NECA Reply (Mar. 4, 1988) at 78-83, 71-76, Appendix A at 27-42; NECA's Average Schedule Information Request Responses (Sept. 15, 1987) at 6-1 to 6-21; 7-1; 9-1 to 9-6; 10-1 to 10-2; 11-1; 12-3 to 12-5; 13-1; 16-1 to 16-13; 19-1; 19-3 (sample size did not increase materially in moving from one standard deviation to two standard deviations); NECA's Supplemental Reply (May 13, 1988) at 17-24.

[32] *Id.* at 72, n. 126.

[33] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 10-2 (footnote omitted). NECA performed statistical tests to confirm the accuracy of that assessment. *Id.* at 10-2, n. 1 and 16-1 to 16-13.

[34] *See Average Schedule Order* at 1023-26, paras. 9, 12. Implicit in those criticisms that argue for more perfect statistical, methodological, and developmental procedures and data are the assumptions that time and resource considerations are not binding

data base for NECA's revisions,[35] and second, that the companies that NECA chose were, in fact, not representative of the universe of average schedule companies. Here we will address more detailed criticisms that relate to the "representativeness" of the data that NECA used.

9. With respect to ICORE's second line of attack (*i.e.*, probabilistic and statistical contentions notwithstanding, NECA's "sample" data bases, are, by simple factual examples,[36] not representative of the universe of average schedule companies), we do not find ICORE's arguments persuasive. First, we find that NECA successfully rebuts ICORE's challenge of inconsistent exclusion approaches to the cost company and average schedule company data sets.[37] We further find that the examples of "unrepresentativeness" identified by ICORE neither establish that the statistical properties of the values examined were not sufficiently representative of relevant properties of average schedule companies, nor that if, in some respect not otherwise identified, they were in fact not representative, that the inclusive effects were other than *de minimis*.[38] Affidavits, and NECA's responses to our interrogatories, state that good faith efforts and tests were made to examine the properties of the values that were computed from those data bases to determine whether or not they were anomalous with respect to the companies that were identified by ICORE. The bulk of ICORE's criticisms stem from its view that the companies in the cost company data set are not "representative" of average schedule companies due to their size. However, according to Mr. Quinnan (NECA Group Manager - Access Methods and Statistical Applications):

> It is certainly true that samples are more efficiently selected, and estimates more accurate, when both are dependent upon size. But this is only true when the measure of size is found to be proportionate to the value being estimated. The size criteria ICORE is referring to have explicitly been proven not to be related to the allocation factors being estimated, as shown in the Information Response at Question 16.[39]

We find this representation to be credible. In light of that testimony, NECA's responses to our questions, and NECA's other filings,[40] we are not persuaded that there was material, or otherwise significant, variation introduced in the cost company allocation ratios as a consequence of the size "anomalies" that were identified in this proceeding that would adversely affect the construction of the average schedules.[41] More generally, we find that the data utilized by NECA were sufficiently representative of average schedule and cost company characteristics[42] as to satisfy Section 69.606(a) of our rules.

b. Accuracy Of Average Schedule Demand Data

10. NECA used demand data to calculate the coefficients of the settlement variables in the average schedule formulas and, in the case of the flash-cut, to conclude that 15.9 messages per access line approximated an 85% common line revenue requirement for average schedule companies. NECA generally derived the demand statistics by taking 1982 data on access lines, interstate toll messages, access minutes, and billing and collection messages and projecting the data to December 1986.[43]

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constraints. *See* ICORE Comments (Jan. 5, 1988), Appendix A at 31 ["NECA's time frames and resource levels were self-imposed."]. *Compare id. with* NECA Reply (Mar. 4, 1988), Appendices B, D, F-H; 47 C.F.R. § 69.606(b). As noted above, NECA did not have an unlimited amount of time to prepare proposed revisions, since it was already in violation of § 69.606(b). Moreover, the data that were available within the exchange carrier industry were not of a type that was well-suited for use in an exchange carrier association administered access charges environment. NECA Reply (Mar. 4, 1988), Appendix D.

[35] ICORE appears to infer that random, or stratified sampling is the only correct approach since it concludes that all previous average schedule revisions had been computed from such sampling techniques. *See e.g.*, ICORE Comments (Dec. 6, 1985) at 19. *But see* NECA Reply (Mar. 4, 1988), at 106, 108, Appendices D, B, A. However, the only average schedules that were based upon such sampling and data collection techniques were performed in the early 1970's, and did not thereafter determine the settlement values that were contained in the settlement schedules. *Id.*, Appendices A, D.

[36] *E.g.*, ICORE Comments (Jan. 5, 1988) at 31-32.

[37] *See, supra,* Appendix at paras. 5-6 and references cited therein.

[38] *See, e.g.*, NECA Reply (Mar. 4, 1988) at 68-99, Appendices A-C, I-J.

[39] *See* Affidavit of Mr. Stephen Quinnan, NECA Reply (Mar. 4, 1988), Appendix A at 28.

[40] *Compare, e.g.*, NECA Reply (Mar. 4, 1988) at Appendices G, D, F, A, B (Affidavits of Mr. R. Dale Wagner, Mr. Warren French, Mr. Donald L. Hirt, Mr. Stephen Quinnan, and Dr. Robert A. Koyak)*with* ICORE Comments (Jan. 5, 1988), Exhibit A (Affidavits of Mr. Jan Reimers), ICORE Supplemental Comments (Apr. 4, 1988), Exhibit B (Affidavit of Mr. Jan Reimers)*and* NECA Supplemental Reply (May 13, 1988), Appendix B (Affidavit of Dr. Robert A. Koyak). We note the uncontradicted statement that is contained in the affidavit of Mr. Quinnan at page 10: "Mr. Reimers participated fully in the development of NECA's 1985 filing. The decision that it was necessary to use available data rather than a statistical sample of cost company data was made in consultation with Mr. Reimers, and he fully supported it at the time. In fact, Mr. Reimers presented this proposal to a Task Group meeting in 1984. Mr. Reimers' complaint that his suggestions were 'ignored' is difficult to credit, especially in light of the affidavit of Mr. Dale Wagner, Mr. Reimers' direct supervisor, who states that he was aware of no dissension among his staff during the relevant time period." NECA Reply (Mar. 4, 1988), Appendix A at 10. *Compare id. with* Affidavits of Mr. Dale Wagner (NECA Reply of March 4, 1988 at Appendix G) and Mr. Reimers (ICORE Comments of January 5, 1988 at Appendix C; ICORE Comments of April 4, 1988 at Exhibit B).

[41] *See, e.g.*, ICORE Comments (Jan. 5, 1988) at Appendix A (first affidavit) at 21-24; NECA Reply (Mar. 4, 1988), Appendix A at 37. *See also* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 6-1 to 16-13.

[42] *See City of Brookings* Joint Appendix at 400-1361. NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 6-18, 28.

[43] NECA described "demand data" as consisting of "access lines, interstate toll messages, access minutes, and billing and collection messages as defined in NECA's Average Schedule Pool Administration Procedures." NECA Average Schedule Information Request Response (Sept. 15, 1987) at 26-1. NECA projected these data to the mid-point of test period (*i.e.*, December, 1986) by multiplying the base amount by an annual growth rate

1. Comments

11. ICORE questions the accuracy of the "pool report" data that NECA had received during May 1985,[44] because data that were contained in those pool reports resulted from the first "true-up"[45] that had occurred. Because those data only became "final" in May 1987, ICORE contends that NECA's use of the initial data was invalid, and that NECA should have used the final data instead.[46]

12. In response, NECA states: (1) that the May 1985 "true-up" data were the most current data then available that could have been employed; (2) that ICORE could not seriously be contending that NECA, in 1985, should have waited until some time after May 1987 before filing proposed average schedule revisions; (3) that, in any event, NECA performed the analyses requested by ICORE after the final "true-up" data had become available, and that the result confirmed the accuracy of the initial analysis (*i.e.*, in effect, there was no significant variation in the results of the analysis, whether based upon the "trued-up" demand data for May 1985 or May 1987).[47] In response, ICORE observes that there is no way that NECA could know whether it made any difference, since NECA had "inadvertently erased" the May 1985 data file and could not, therefore, make such a comparison.[48]

2. Discussion

13. At the time that NECA performed its initial analysis, the May 1985 view was the most current demand data that were available that could be used for the purpose of computing the flash-cut, particularly when an additional time allowance is made for computations, model testing, NECA's internal review cycle for proposed revisions to the average schedules, discussions of the proposed changes with OPASTCO, NTCA, USTA, the Average Schedule Development Committee of the NECA Board, and the NECA Board of Directors. As noted above, NECA was within ten weeks of a second violation of Section 69.606(b), when it filed its proposed revisions on September 17, 1985. Waiting an additional two years for final pool data before NECA filed proposed revisions to the settlement schedules absent NECA Board certification that no changes were necessary, would have violated the Commission's rules. Such a NECA Board certification would have been inappropriate at that time. As a consequence, NECA's decision to use the May 1985 view of the pooled settlements data was not only prudent, but under the circumstances was virtually the only practical alternative available to NECA.[49]

14. ICORE claims that NECA's analysis cannot prevail because of the loss of the May 1985 data file. It does not enhance the perception of NECA's competence or credibility when, in a contested proceeding, it accidently loses, through a computer data erasure error, demand data that were utilized in developing its average schedule proposal.[50] Having said that, however, we believe that the loss of that data file was harmless in this case.[51] The data that were lost were one month's data, within a 24 month continuum beginning March 1985, in which NECA had

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factor. *Id.* 26-1, 26-3 to 26-9. Access line data were obtained from the October 1982 Universe Survey file that was developed by AT&T and the Bell Operating Companies before divestiture. *Id.* at 26-1 to 26-2. NECA settlements data were obtained from pool reports as of May, 1985. *Id.* at 26-2. Originating messages were calculated through a five step process that began with October 1982 study area message quantities. Those message quantities were adjusted for seasonality and then multiplied by the growth ratio to projectthose data into the mid-point of the test period. *Id.* at 26-5 to 26-7. Access minutes were developed from NECA monthly settlement reports for those areas that had provided settlement reports (for non-reporting companies, it was estimated), converted to a common monthly access minutes basis, and then projected to the test period "by multiplying each study area's minutes by the respective state specific originating message test period growth factor described above." *Id.* at 26-8. Billing and collection minutes were developed similarly. *Id.* at 26-8 to 26-9. The procedures that NECA employed to ensure the accuracy of that data are described in NECA's response to question 27 of the Bureau's interrogatory. *Id.* at 27-1 to 27-2. The demand data were then used to develop settlement schedules. *Id.* at Tabs 28, 1-5, 26-27, 29-30. Different demand data (*i.e.*, the May 1985 view of March 1985 settlement data) were used for the purpose of computing the 15.9 messages demarcation point for flash-cut transition treatment. *Id.* at 1-1.

[44] ICORE Comments (Jan. 5, 1988) at 48, Exhibit A at 9-11 and attachments [ICORE's Exhibit A contains two affidavits from Mr. Reimers; the citation here identifies pages with respect to the first of those affidavits].

[45] Under NECA's contractual agreements with its exchange carrier members, exchange carriers have 24 months within which they may "true-up" settlements data before the settlements data are conclusively binding among exchange carriers and NECA. *See* NECA Reply (Mar. 4, 1988) at 93; ICORE Comments, Appendix A (first affidavit) at 10; NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 1-1, n. 1.

[46] ICORE Comments (Jan. 5, 1988) at 48, n. 140 and references cited therein; *id.*, Appendix A (first affidavit) at 10.

[47] NECA Reply (Mar. 4, 1988) at 92-93; NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 1-1 to 1-2. *See also* NECA Reply (Mar. 4, 1988) at Appendix A, 13.

[48] ICORE Supplemental Comments (Apr. 4, 1988) at 36, n. 94.

[49] *See* Affidavit of Mr. Don Hirt, NECA Reply (Mar. 4, 1988), Appendix F at 10. NECA would, of course, also have been subject to criticism if it had ignored the "trued up" data (even though it was only the first of several "true-ups") that were present and instead used earlier data that were not "trued up." Accelerating message volumes for some average schedule companies required estimation techniques that utilized the most recent demand data available. The flash-cut analysis was based upon the May 1985 view of estimated settlements because it was necessarily tied to the most recent view of then existing demand data (*i.e.*,, the May 1985 view of March 1985 demand data). NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tab 1.

[50] *See, e.g.*, NECA Average Schedule Information Request Responses at 5-1, n. 1 ["Subsequent to the completion of this analysis in 1985, certain computer data files containing the detail underlying the scattergram shown in the 1985 filing were inadvertently erased. NECA has, nevertheless, attempted to respond fully to this question based upon the 1985 data which is still available."].

[51] Both NECA and ICORE appear to consider the loss of this particular data file as being most significant in the context of the 15.9 messages per access line "flash-cut." *See* NECA Reply (Mar. 4, 1988), Appendix A at 13-21; ICORE Supplemental Comments (Apr. 4, 1988) at 38, 36 at n. 94. Even though we believe that the 15.9 messages per access line flash-cut had adequate support on other grounds, we have required, as a remedy, that any exchange carrier that was subject to that flash-cut may request that NECA perform a cost study to determine whether that formula produced appropriate results for that particular carrier. The demand data that were used to

all previous months' views of that data, as well as all subsequent months' views of the same data.[52] NECA was, in fact, able to replicate its analysis after final pool data for that period had been received, and confirm the accuracy of its initial analysis.[53]

c. Computation Of Growth Rates

15. In constructing its settlement schedules, it was necessary for NECA to adjust the historical data that it possessed to a common point in time for the period that NECA anticipated that the settlement schedules would be in effect (*i.e.*, from June 1, 1986 through May 31, 1987). As a consequence, NECA adjusted the average schedule company financial data, the cost company data, and the demand data to that time frame through the use of growth rates. The procedures that NECA employed are described in detail in its September 15, 1987, responses to the questions that the Bureau directed to NECA in response to the Court's remand.[54]

1. Comments

16. As noted above, data from the base period were extrapolated into the middle of the expected settlement period (December 1986).[55] ICORE objects to the manner in which this extrapolation was performed in four major respects. First, ICORE observes that NECA estimated average schedule companies' growth trends on the basis of data that included data from cost companies as well as data from average schedule companies.[56] ICORE contends that this was inappropriate because NECA had not explained or justified the assumption that cost company data could be used to estimate the growth of average schedule companies. Second, ICORE claims that "there was extreme variability in the growth data over the years studied." [57] As examples, ICORE pointed to the fact that Telephone Plant For Future Use for commercial companies had a negative growth rate of 23.1 percent for the 1982-1983 interval," but had an average gain of 21.3 percent over the period 1981 to 1983" while Deferred Credits & Operating Reserves for co-op companies "gained 301.4 percent between 1982 and 1983, but gained only an average 117.1 percent over the 1981 to 1983 period."[58] ICORE states that given "this variability, it was statistically incorrect to apply a simple average growth rate to all companies' data."[59] Third, ICORE claims that NECA treated the growth rates of commercial companies and cooperative companies in a seemingly arbitrary manner by using a complicated methodology that was unnecessarily elaborate and unjustified.[60] Finally, ICORE states that "NECA's growth rate computations are nonrobust, untested, and fail to consider seasonality. Moreover, NECA improperly ignored evidence that the growth rates were increasing over time, and improperly failed to consider whether different accounts grew at different rates."[61]

17. NECA responds by first noting that the use of cost company data in estimating growth trends for average schedule companies did not constitute a methodological flaw, since, given the limited amount of useful data that were then available,[62] the projection necessarily depended upon the assumption that "the average rate of change over the prior two years would continue,"[63] a judgment, it claims, that ICORE has not demonstrated was unreasonable under the circumstances.[64] NECA explains that, in any event, it could not have excluded small cost company study areas from the sample because "the only history of detailed accounts necessary to compute growth rates was a composite of data for both cost and average schedule REA borrowers."[65] Moreover, according to NECA, the inclusion of small cost companies for calculating growth trends was not unreasonable "in view of the fact that an object of the average schedules is to simulate the settlements received by similarly situated cost companies."[66]

18. NECA argues that ICORE's criticisms with respect to the "extreme variability" exhibited with respect to two accounts (Telephone Plant Held for Future Use; Deferred

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compute the average schedule revisions did not include the May, 1985 demand data file erasure. *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 26-27; NECA Reply (Mar. 4, 1988), Appendix A at 52.

[52] NECA Reply Comments (Mar. 4, 1988), Appendix A at 13.

[53] *Id.* ["The file involved consisted only of an early view of one month's settlements. The loss of this file does no harm. This type of data is updated each month as companies report adjustments and corrections to the NECA pool. Thus, in responding to Question 5 of the Common Carrier Bureau's August 11, 1987 data request, NECA was able to regenerate the scattergram using a current view of the same data. The results confirmed the accuracy of NECA's original calculations."].

[54] *See, e.g.*, NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 20-26, 28.

[55] NECA's proposal contemplated an effective date of June 1, 1986 for its proposed revisions. It was thus necessary for NECA to relate base period data to the settlement period through the use of growth rates. *See* NECA Modification of Average Schedules at 1.

[56] ICORE Comments (Jan. 5, 1988) at 46.

[57] *Id.* at 46.

[58] *Id.*

[59] *Id.* at 47, citing Letter from Mr. Henry Coo (Exhibit B) at 10. It should be noted, however, that NECA did not use "a simple annual growth rate." *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 23-1.

[60] ICORE Comments (Jan. 5, 1988) at 47, which cites NECA's Average Schedule Information Request Responses (Sept. 15, 1987) at 20-3 to 20-6 and the affidavit of Mr. Jan Reimers (Exhibit A, first affidavit) at 28.

[61] *Id.* at 47, citing letter of Ms. Christine Upchurch (ExhibitB) at 22-23. *See also id.*, Exhibit B, letter of Ms. Christine Upchurch at 21-25.

[62] *Id.* at 88.

[63] NECA Reply (Mar. 4, 1988) at 88.

[64] *Id.* at 92. *See also id.* at n. 173 ["ICORE also claims that NECA 'improperly ignored evidence that the growth rates were increasing over time, and improperly failed to consider whether different accounts grew at different rates'. [ICORE Comments, p. 47] If such information had really existed, it would have been necessary to develop a time series model, as described above, to use the information. The impracticality of such a model has already been addressed. Furthermore, it is speculative on ICORE's part to suppose that a small difference in growth in two years is indicative of a trend. NECA's average growth method avoided this pitfall, while utilizing all the growth data available."].

[65] *Id.* NECA explains that these composite data were available for 919 study areas, and thus necessarily had to be treated in aggregate terms. *See, e.g.*, NECA Average Schedule Information Request Responses (Sept. 15, 1988) at 20-2, 20-4, 20-6, 20-7, 21-2 to 21-9; NECA Reply (Mar. 4, 1988) at 88-92; NECA Supplemental Reply (May 13, 1988) at 28.

[66] NECA Reply (Mar. 4, 1988) at 89.

Credits & Operating Reserves) were not material, since the Deferred Credits & Operating Reserves account "was not employed in the study at all"; and the Telephone Plant Held for Future Use account "represents less than five-one-hundredths of one percent of the interstate revenue requirement of REA borrowers."[67] With respect to the complexity of its procedure for recognizing differences in the growth rates of commercial: companies and co-operatives, NECA states "this stratification recognized the distinctive growth attributes of these types of companies, as documented in NECA's Information Response.... The use of stratification was contingent on two criteria: the availability of data to develop strata, and the degree of accuracy which could be achieved through stratification. Because the growth attributes of these companies were significantly different in some accounts, stratification was warranted."[68] Finally, with respect to NECA's decision not to robustify[69] its growth estimates, and its decision not to perform the additional statistical tests or make the adjustments that ICORE suggested would be appropriate, NECA stated that reliable data for performing the suggested tests simply were not available.[70]

19. ICORE responds in its supplemental comments that its identification of two accounts with gross swings (*i.e.*, Telephone Plant Held For Future Use; Deferred Credits & Operating Reserves) served only as examples of substantial swings in account growth rates between 1981 and 1983.[71] With respect to seasonality, and the additional tests that ICORE suggested would have improved the quality of NECA's revisions,[72] ICORE states that NECA's observation that the requisite data did not exist should not shield NECA from having proposed schedule revisions that have substantial settlements effects "without assurance that they are doing so through reasonably accurate schedules."[73]

2. Discussion

20. We conclude that the growth measurements employed by NECA in preparing its proposed revisions to the average schedules were reasonable. First, with respect to the fact that growth rates were calculated from composite average schedule company and cost company data, the extensive number of study areas utilized (more than 900) provided adequate assurance that the calculated growth rates would be sufficiently representative.[74] As noted above, disaggregated interstate cost data for average schedule companies were not available (and would not become available within any relevant time period) that would permit growth rates for jurisdictionally separated account titles for individual average schedule companies to be determined.[75] It was therefore necessary for NECA to attempt to utilize, if possible, reasonable surrogates for that underlying information. NECA's decision to use aggregate data for cost and average schedule companies was not inappropriate.

21. NECA's decision to differentiate with respect to the growth rates between commercial and co-operative companies, for those accounts that exhibited variations as between commercial and co-operative companies, was similarly appropriate because the growth rate variations among accounts were sufficiently significant to justify that approach.[76]

22. With respect to ICORE's criticism of NECA's use of a growth rate calculated for the two year period, 1981-1983, as the basis for extrapolating data into the 1986 time frame, we conclude that NECA's method was reasonable under the circumstances given the enormous changes that had occurred as a result of the deregulatory, accounting, and separations modifications that were underway that have been noted above. To have done otherwise would have involved using an earlier and therefore

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[67] *Id.*

[68] *Id.* at 89-90.

[69] Ms. Upchurch's, and ICORE's, references to "nonrobust" data, "robustification," and "non robust" techniques concern whether or not aberrational values are included within sets that are utilized for calculations that are intended to be representative of the population from whom they were drawn. Ms. Upchurch describes this concept at ICORE Comments (Jan. 5, 1988), Appendices at Tab B, Statistical Evaluation of National Exchange Carrier's Average Schedule Revision Based on NECA's September 15, 1987 Filing at 2-3. The desirability of employing non-robust procedures is discussed in other contexts throughout the filings in this proceeding. Observations that are applicable with respect to the appropriateness of excluding the "outlier" in those contexts have similar applicability in the instant context as well. The key is whether the characteristics of extreme values in one domain of data in the context of measurements of one variable are relevant with respect to the measurements of other variables where the extreme values in the first domain do not affect the variables that are being evaluated in the second. *See generally,* NECA Reply (Mar. 4, 1988), Appendices A, B, *passim. See also* NECA Supplemental Comments, Appendix B, *passim.* We concur in Dr. Koyak's and Mr. Quinnan's assessments on robustification, and robust treatment, in the context of NECA's development of its proposal.

[70] *Id.* at 89-90. *See also* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 20-2 to 23-3 [description of data available and techniques employed by NECA in calculating growth rates].

[71] ICORE Supplemental Comments (Apr. 4, 1988) at 35. ICORE does not provide any additional examples of account variations that it would have considered to be material nor does it otherwise attempt to rebut NECA's contentions. *See id.* at 34-36. As a separate matter, ICORE asserts, without amplification, that NECA could have adjusted its growth calculations to remove cost companies from the composite data as it did in its 1988 filing. *Id.* at 34-35. We observe that the data between the two periods are not identical with the consequence that the substantive content of the adjustment procedures necessarily would have varied (*e.g.*, the companies that were in average schedule status for interstate settlement purposes varied among the time periods identified; those that were not average schedule were cost, and *vice-versa).* In addition, the quality and meaning of the data that were employed within the 1988 filing possessed different substantive attributes as compared with the data that were employed in the September 17, 1985, NECA filing. As a consequence, we have concluded that ICORE's suggestions in this regard are inapposite.

[72] ICORE Comments (Jan. 5, 1988) at 47; ICORE Supplemental Comments (Apr. 4, 1988).

[73] *Id.* at 35-36.

[74] *See* NECA Average Schedule Information Request Response (Sept. 15, 1987) at 21-1 to 21-9.

[75] Application of growth rates obtained from composite cost and average schedule companies (*see id.* at Tabs 21-23) was also appropriate for application to unseparated account data since, ultimately, the revisions were based upon the application of representative cost company data to unseparated average schedule company financial data. *See, e.g., id.* at 24-1.

[76] *See generally,* NECA's Average Schedule Information Request Responses (Sept. 15, 1987) at 20-2 to 23-3.

less representative time period as the starting point for computing rates of change as the basis for projecting future values. Moreover, given the unrepresentative nature of earlier data that were obtainable during this chaotic period, the use of more refined computational techniques (*e.g.*, estimation techniques that were based upon longer time series data, or computations that involved alternative types of compounding) were not warranted given the known inherent variations in the data that were available and the limited period for which data were available. Similarly, using 1984 [*i.e.*, divestiture "contaminated"] financial and cost data for projecting growth rate estimates into the settlement period would not have been as defensible as an end point for measuring projected growth rates due to the financial distortions that resulted from the termination of the integrated, pre-divestiture settlements system and the implementation of our access charge rules.[77]

23. ICORE's observations with respect to the volatility of certain intra-period growth rates, do not appear to be of sufficient significance to call into doubt NECA's growth rate calculations. As noted by NECA, one of the two accounts identified by ICORE as being exceptionally volatile (Deferred Credits and Operating Reserves) was not utilized by NECA in developing its revisions, and the second account title (Telephone Plant Held For Future Use) constituted less than five-one-hundredths of one percent of the total interstate revenue requirements of all REA borrowers.[78] The other intra-period variations that are identified by ICORE between 1981-1982 and 1982-1983 as being indicative of flawed growth rate data (and calculations, since time series evaluations were suggested) were actually quite small.[79] Moreover, volatility with respect to construction related accounts, particularly when considered in light of modifications in tax treatments (and the related accounting for intangibles) that are the result of changes in federal and state tax laws, regulations, and decisions are, to some extent, to be expected. It is worth noting that the changes in the growth rates that ICORE explicitly identified were moderated as a consequence of NECA's decision to use data from a two year period (rather than the individual values from either of the two years), and that the purpose of computing growth rates for account groupings was to forecast the absolute growth in each account grouping that would occur from the base period to the midpoint of the test period. We find that NECA's assumption in this regard (*i.e.*, that the 1981-1983 growth rate would continue through 1986) was reasonable, and as noted above, was the most reasonable assumption that NECA could make, given the changes that had occurred in underlying data from prior periods as well as the changes in data that occurred after divestiture.[80]

24. In more general terms we find that the judgments and tests that NECA employed in adjusting and applying growth rates to its data base computations were appropriate under the circumstances, and that the additional testing or other modifications suggested by ICORE, particularly given the time and data constraints that were present, was neither necessary nor desirable.[81]

d. Schedule Computations

25. In developing its average schedule settlements and transition proposal, NECA examined and evaluated equations on the basis of the data that have been discussed in the preceding sections. On remand, ICORE criticizes virtually every aspect of that process. Those criticisms range from the adequacy of NECA's statistical testing through

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[77] *See, e.g.*, Affidavit of Dr. Robert A. Koyak, NECA Supplemental Reply (May 13, 1988), Appendix B at 2, 4.

[78] NECA Reply (Mar. 4, 1988) at 89. ICORE did not attempt to refute this statement, or otherwise show that the intra-period variations in growth rates that it identified had materially biased the results of NECA's developmental efforts.

[79] As described by Ms. Upchurch, "NECA's own comparison indicated possible flaws with the growth rates. NECA compared growth rates for 1981-1982 with those obtained for 1982-1983, in two categories--total expenses and total net telephone plant in service. These results are presented below:

	'81-'82	'82-'83
Total Expenses	14.8%	15.1%
Total Net Tel. Plant in Service	6.4%	7.3%"

ICORE Comments (Jan. 5, 1988), Exhibit B, comments of Ms. Christine Upchurch at 23. However, the difference in total expenses between the two periods is 0.3% (*i.e.*, 15.1% - 14.8%), and the difference in total net telephone plant in service between the two periods is 0.9% (*i.e.*, 7.3% - 6.4%).

[80] ICORE also criticized NECA for not considering seasonality in computing growth rates during the 1981-1983 period. *E.g.*, ICORE Comments (Jan. 5, 1988), Appendix A at 22. In response, NECA notes that seasonality testing (and incorporation in modelling) has two "fundamental prerequisites for the performance of such tests: history and data. The aftershock of AT&T divestiture and introduction of the access charge plan provided neither... Tests of any models against past performance, much less of data intensive time series and seasonal adjustment models, was considered... [to be]... out of the question due to impossibility of obtaining a history of data." We concur in this assessment. In light of the turmoil that was associated with the period immediately preceding and subsequent to divestiture, it was unlikely that adequate or reliable data for meaningful time series analyses or seasonality growth rate diagnostics existed.

[81] The additional time that would have been associated with the adduction of more perfect, or more complete, data would not have been acceptable given the clear-cut need for average schedule revisions that eliminated message driven common line settlements. NECA's revisions, when filed on September 17, 1985, were already late (*see* 47 C.F.R. § 69.606(b)) and anomalous ARPM driven compensation was accelerating. This consideration was not, in our view, adequately incorporated in Ms. Upchurch's, Mr. Reimers', or other ICORE assessments of NECA's data choices, testing, model specification, formula computations, choices of variables, choices of functional forms, or documentation, nor were the added resources attendant to incorporating the improvements suggested by ICORE perceived by ICORE as imposing any meaningful constraints as to what NECA should have done or realistically could have been expected to have been done. *See, e.g.*, ICORE's Comments (Jan. 5, 1988), Appendix B, undated letter of Ms. Christine Upchurch at 1-29, Executive Summary at Appendix C, Appendix C (Letter from Mr. Robert Brousseau to Mr. Jan Reimers, dated Dec. 23, 1987) at 1-11; ICORE Supplemental Comments (Apr. 4, 1988), Exhibit C (Letter from Mr. Henry Coo to Mr. Jan Reimers) at 10-11, Exhibit D (Response of Ms. Christine Upchurch, dated Apr. 1, 1988) at 7-10, 12, Exhibit E at 1-2, 4-5. *Compare id. with* NECA Reply (Mar. 4, 1988), Appendices B, C *and* NECA Supplemental Comments (May 13, 1988) at Appendix B.

the contention that NECA did not evaluate non-linear mathematical forms for constructing the average schedules. ICORE also contends that NECA has not explained how the settlement schedules were actually calculated.[82] In the paragraphs that follow in this section, we discuss criticisms pertaining to NECA's computations, formulas, and statistical tests.

1. Comments

26. ICORE has, throughout the course of this proceeding, provided extensive criticisms of the statistical tests and other calculations that NECA performed,[83] and has also provided criticisms of the mathematical forms that were evaluated by NECA in attempting to design settlement schedules that would simulate cost company disbursements pursuant to Section 69.606(a). According to ICORE, these "problems include lack of sufficient statistical justification, use of improper quantitative reasoning, use of incorrect statistical formulas, and application of nonrigorous techniques in the creation of the revised average schedule formulas."[84] In particular, ICORE criticizes NECA on the grounds that: (1) "NECA's responses indicate that many quantitative results (including the formulas themselves) lack proper statistical justification";[85] (2) NECA exercised "poor judgment" with respect to many of the quantitative steps (such as correlation analyses) that were involved in the development of the revised formulas;[86] (3) NECA exercised poor judgment in its "continual use of nonrobust techniques within the implementation of the methodology driving the revised formulas";[87] (4) NECA used formulas that either were "statistically invalid or completely incorrect (such as the use of ordinary least squares to fit the equation that would be used to determine at what message count the "flash cut" should be applied)";[88] (5) alternative model analyses were "quite limited... [since]... NECA typically only considered models with one predictor (independent) variable... of these models, they typically considered straight line models, ignoring the potential improvement of other linear models (such as higher order equations)";[89] (6) many

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[82] *See* ICORE Comments (Jan. 5, 1988), ICORE Reply (Apr. 4, 1988), and references cited therein.

[83] Correct statistical testing, as characterized by ICORE appears to have the properties commonly associated with the "scientific method" as the basis for cognition, analysis, and belief. Under the "scientific method," laboratory notes and the results of tests are recorded, maintained, and available to other investigators, if requested. Data are available for examination, replication (by similar tests), and evaluation. Within that frame of reference, ICORE has characterized NECA's efforts as being invalid since NECA: (1) did not maintain contemporaneous records of all of the tests and functional forms that its personnel utilized in developing revisions to the average schedules; (2) "destroyed" demand data that were utilized in the "flash-cut" determination; (3) did not retain the numerical results of tests that were performed. *See, e.g.,* Affidavit of Mr. Jan Reimers, ICORE Comments (Jan. 5, 1988), Appendix A (first affidavit) at 7-10, 25-32, 35; *id.* at Appendix A (second affidavit) at 3-11; Letter from Mr. Henry Coo (Dec. 23, 1987), *id.,* Appendix B at 3-10; Memorandum from H. Coo to R. A. Gore (June 10, 1980), *id.,* Appendix B at 2-3; Memorandum from H. Coo to S. Kail (Aug. 21, 1980), *id.,* Appendix B at 2-5 *id.,* Appendix B at Attachment C; Memorandum from Mr. Henry Coo to Mr. Steve Quinnan (Nov. 14, 1980), *id.,* Appendix B at 2-4; Letter from Ms. Christine Upchurch (undated), *id.,* Appendix B (with attachments), *passim. But see* NECA Reply (Mar. 4, 1988), Appendices D, F [the average schedule revisions that occurred between 1978 and 1983 resulted from compromises between AT&T and USITA, and have never risen to a level of abstraction, precision, or implementation, that could fairly be ascribed as even roughly approximating a level of clinical precision analogous to the use of the scientific method in the physical, life, or social sciences.]. As noted by Mr. Coo, negotiation of a percentage adjustment ("k-Factor") as a basis for computing revisions to the average schedules had no quantifiable basis other than the judgment of negotiators. ICORE Comments, Appendix B at 4, para. 4. c. The 1983 ARPM schedules that ICORE maintains were revised through scientific analyses and procedures were, in fact," k-factored." *See* ICORE Comments (Apr. 4, 1988), Exhibit C at 5 ["there were no losers because the existing schedule was k-factored"]. Laid against the standard of previous revisions to the average schedules (1974 excepted), NECA's proposed revisions were, from an epistemological perspective, a clear improvement over prior practice.

[84] *E.g.,* Letter from Ms. Christine Upchurch, ICORE Comments (Jan. 5, 1988), Appendix B, at 1.

[85] *Id.* ["For example, the quality of the growth models and the allocation factors remain completely untested. In other words, NECA made up formulas to describe cost allocation and growth trends that *have no statistical basis for representing reality.* In fact it has been shown that the allocation factors actually poorly estimate the cost company allocation data from which they come! Poor allocation estimates and unrealistic growth models in turn will yield predicted revenue requirements that are inaccurate, hence making the settlement formulas appropriate."] *Id.* at 1-2.

[86] *Id.* at 2. ["For example, when NECA was selecting regression equations to describe settlements, only correlations were used to measure the importance of particular variables in predicting revenue requirement. In other words, if NECA implicitly surmised that if two variables are not related by a straight line, then the two variables are not related at all. Such misinterpretation of correlations is warned against in even the most elementary of statistics courses! For clearly one variable could, say, equal the square of other variable; hence one variable perfectly predicts the other, but using NECA's logic the variable is deemed "insignificant" because the correlation is identically zero. By doing this, NECA eliminated numerous models that may have resulted in much better average schedule formulas."].

[87] ICORE Comments (Jan. 5, 1988) Appendix B (Letter from Ms. Christine Upchurch).

[88] *Id.* at 3. ["However for technical reasons, based on the behavior of the data used, this method is invalid. In addition, NECA describes confidence limits surrounding the 'flash cut' originally obtained as well as the alternative 'flash cut' value. But the formulas that NECA used for these confidence intervals are *incorrect!* Also note that to determine the settlement formulas for both common line and billing and collection, NECA purposely adjusted the formulas so that the formulas *no longer fit the data as well as possible.* From both an intuitive and a statistical vantage point this is unreasonable. The result of this is that most companies' revenue requirements are either *under* predicted or *over* predicted, making the formulas unsound at best."].

[89] ICORE Comments (Jan. 5, 1988), Appendix B, letter from Ms. Christine Upchurch at 5. Ms. Upchurch continued, by noting "[b]y only considering correlations, [NECA] implied that a variable could not predict another variable unless the relationship was a straight line. In addition, [NECA] did not stratify based on 'look-alike' characteristics (such as in the creation of access allocation formulas based on cost company data), which may potentially lead to increased variability and hence inequitability in the formulas." *Id.* at 5-6. *See also id.* at 6-8 ["Consider the manner in which regression models were obtained. When choosing predictor (independent) variables, NECA typically used correlations for determining the importance of the variable. However since correlations measure only the straight-line relationship, variables were thrown out as 'insig-

of "the formulas used in the development of the revised average schedules were not statistically tested for their appropriateness",[90] and (7) that "NECA refused to disclose the actual computations that led from the data discussed... to the specific average schedules it adopted."[91]

27. In response, NECA states: (1) that non-robust statistical techniques were only used if non-robust treatment would not have biased the values being calculated;[92] (2) before it is possible to perform tests with respect to projective factors, it is necessary to have "two fundamental prerequisites for the performance of such tests: history and data" – prerequisites that were missing when NECA prepared its proposed revisions;[93] (3) algebraic and formula anomalies that ICORE and its affiants contended existed were, in fact, not present since the "anomalies" referenced by ICORE were mathematically equivalent statements;[94] (4) contrary to the impressions conveyed by ICORE, NECA tested, and in fact utilized, functional forms that were non-linear;[95] (5) NECA has provided all data necessary for calculating the average schedules;[96] (6) NECA has provided all of the mathematical statements that are necessary tocompute the settlement schedules that it proposed;[97] and (7) under D.C. Circuit precedent, NECA was not required to provide the results of each calculation since this Commission is 'entitled to rely on... representations by parties who were uniquely in a position to know,' given the impracticability of conducting 'elaborate independent verification proceedings.'" (citing *NARUC v. FCC*, 787 F.2d at 1124-25).[98]

2. Discussion[99]

28. Contrary to ICORE's claims, NECA's analyses did, in fact, include adequate evaluations of alternative average schedule formulas and also included statistical tests and measurements that were appropriate to the data that were available.[100] For example, although ICORE repeatedly

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nificant' without further analysis (such as residual plots) that may have indicated other models based on the same predictor variable that are highly significant. Since one variable can perfectly predict another while their correlation is exactly zero, this can be a fatal misinterpretation of a correlation analysis."].

[90] *Id.* at 6. ["For instance, the allocation factors used to predict access costs (and hence revenue requirements) were not tested or otherwise evaluated for their suitability. As is discussed in Section II and in the Executive Summary, there is evidence that these allocation factors actually misrepresent the cost companies from which they are derived. Also note that the growth models, used to project the data and estimates to the period in question, were not tested. Estimated average schedule demand data and FIT formulas also remain untested. Finally, the regression models used to predict revenue requirements were not tested on the cost company data; this step is essential in evaluating the final formulas."]. *See, e.g., id.* at 18 ["There is no evidence that the models were properly evaluated. When determining the quality of a regression model it is important to analyze residual plots and consider various other regression diagnostics besides correlations. Such an evaluation could have indicated which models to try that may provide a better fit."].

[91] ICORE Comments (Jan. 5, 1988) at 49-53; ICORE Reply (Apr. 4, 1988) at 37-39. ICORE even goes so far as to claim that NECA "has destroyed much of the significant data underlying the schedules, and what remains is incomplete and demonstrably flawed."

[92] NECA Reply (Mar. 4, 1988) at 90-91 and Appendix A.

[93] *Id.* at 91. ["[T]here are two fundamental prerequisites for the performance of such tests: history and data. The aftershock of AT&T divestiture and introduction of the access charge plan provided neither. No assumptions about past records of economic performance could yet be projected into the new telephone industry. Tests of any models against past performance, much less of data intensive time series and seasonal adjustment models, was considered not only out of the question due to impossibility of obtaining a history of data, but frivolous expenditure of resources on a theoretical exercise."].

[94] *See, e.g., id.* at 93-94 ["ICORE also claims that NECA 'varied' the formulas it used in connection with its growth increments without any apparent justification for doing so. ICORE points out that, in projecting the growth of access lines, NECA used the formula: growth minus 1. In projecting the average schedule costs, NECA used the formula: [square root of the growth ratio] minus 1. ICORE argues that this inconsistency was another error in NECA's computations. This criticism betrays ICORE's ignorance of basic rules of algebra, and the computation of compound growth rates. In calculating the growth rate of access lines, NECA's equation recognized that the 1983 demand quantities and the 1982 demand quantities were one year apart. NECA's calculation of the growth rate of average schedule costs, however, recognized that the 1983 costs and 1981 costs used in the growth equation were two years apart. Thus, the square root was used. A similar calculation using 1983 and 1986 data would have used the cube root and one using 1982 and 1986 data would have used the fourth root." (footnotes omitted)]. *See generally, id.*, Appendix A at 55-56.

[95] NECA Reply (Mar. 4, 1988) at 98." ICORE further contends that NECA 'looked only for straight-line type correlations" in developing the formulas, and ignored the possibility of using more than one variable. This assertion is entirely incorrect. The common line formula is a compound linear function of access lines and exchanges. The traffic sensitive formula is a hyperbolic function of access minutes and exchanges. The billing and collection formula (in use prior to January 1, 1987) is a quadratic function of messages and access lines. Thus, none of the formulas are functions of only one variable or based on straight line models. Finally, ICORE accuses NECA of ignoring the model that provided the 'best data fit.' To the contrary, the constrained regression model used 'fit' the data better than any other models tested, as demonstrated in NECA's Information Response, which satisfied certain logical objectives inherent in the schedules. A constraint is a mathematical limitation imposed on a regression model to assure that the results produced are sensible. In this case, a logical objective of the common line settlement formula is that a study area's settlements should increase as access lines increase, but that very small study areas should receive a higher average settlement per access line than larger study areas. This means, obviously, that the model should produce smaller settlements per line as the number of lines increase. Unless the model is constrained, however, it is possible that a company's total settlement could decrease with increases in size." *Id.* at 98-99.

[96] *Id.* at 96, citing as support NECA's September 17, 1985 filing and NECA's November 18, 1985 data submission. *See id.* This observation does not, of course, extend to the loss of the May 1985 demand data which is discussed *supra* Appendix at Section b.

[97] *See* NECA Reply (Mar. 4, 1988) at 94-99; NECA Supplemental Comments (May 13, 1988) at 2, 12-16, 21-30; NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tab 28. *See, e.g.*, NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 28-1 through 28-41.

[98] NECA Reply (Mar. 4, 1988) at 94.

[99] We exclude from this discussion the proof issues that pertain to the 15.9 messages per line demarcation point for the "flash cut."

[100] *See, e.g.*, NECA Reply (Mar. 4, 1988), Appendices B, A, C; NECA Supplemental Comments (May 13, 1988), Exhibits A, B.

claims that NECA only considered linear models,[101] the average schedule formulas that NECA proposed, and that this Commission approved, consisted of a compound linear function of access lines and exchanges for the common line formula, a hyperbolic function of access minutes and exchanges for the traffic sensitive formula, and a quadratic function of messages and access lines for the billing and collection formula.[102] In fact, NECA's original filing stated (NECA Modification of Average Schedules, Appendix A at 6): "[a]ll formulas were tested for linear, quadratic, exponential, logarithmic, and inverse relationships between revenue requirement per demand unit and ratios of demand units."

29. In performing statistical tests, NECA was necessarily guided by the nature of the data present and the materiality of the question at hand.[103] For example, ICORE's consultant, Mr. Reimers, criticized NECA for, *inter alia*, not performing tests on the computed values of its cost allocation ratios to prove that they were representative of average schedule companies.[104] However, as we have discussed previously, it would not have been possible for NECA to have completed such an analysis without having performed actual interstate cost studies of average schedule companies: a requirement that would be in direct conflict with the purpose for which the average schedules were created.[105]

30. With respect to NECA's statistical and mathematical tests, it is indeed true that NECA did not perform every possible test before proceeding to propose revisions to the average schedules. However, it was not necessary for NECA's average schedule developmental process to rise to such a standard, lest the search for ever increasing levels of perfection preclude revisions in an environment in which the quality and meaning of data are changing continuously.[106] We have also concluded that ICORE's concerns with respect to apparent inconsistencies in NECA's development of a compound linear function for common line settlements were not well founded.[107] In developing the common line formula, NECA necessarily took into account two known settlement conditions for average schedule companies: (1) that common settlements per study area would increase as the number of access lines increased; and (2) that smaller study areas, with higher costs per access line, should receive a higher average settlement per access line because of their higher costs per access line.[108] In addition, as Mr. Quinnan and Dr. Koyak stated, it appears that NECA appropriately avoided using the robust methods recommended by ICORE because of the significant bias that utilization of those methods would have introduced.[109]

31. We further note that NECA has provided the data,[110] methodologies,[111] assumptions,[112] and the verifica-

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[101] *See, e.g.*, ICORE Comments (Jan. 5, 1988), Appendix B at 2. *But see, e.g.*, NECA Reply (Mar. 4, 1988), Appendix A at 58-59 ["Ms. Upchurch and Dr. Brousseau state that NECA erroneously tested only straight lines in developing average schedule formulas. This assertion is nonsense. The common line formula is an asymptotic form consisting of two straight lines joined at a spline point. The traffic sensitive formula is a hyperbolic form relating the cost per minute to the reciprocal of minutes per exchange. The billing and collection formula is a quadratic form relating cost per message to messages per line. None of the formulas are straight lines."]; NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 28-23 to 28-26 [*inter alia*, NECA tested logarithmic, polynomial, and hyperbolic forms in addition to linear forms].

[102] NECA Reply (Mar. 4, 1988) at 98.

[103] *See, e.g.*, NECA Supplemental Comments (May 13, 1988) at 27-31, Exhibit B at 2-3.

[104] ICORE Comments (Jan. 5, 1988), Appendix A at 20.

[105] We note, however, that NECA did perform extensive statistical tests of the allocation factors (including attempts using stratified allocation ratios to determine whether improvements from nonlinear models were possible) in developing the average schedules. *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tab 16; NECA Reply (Mar. 4, 1988), Appendix A. Earlier tests that had been performed by AT&T indicated that the results of detailed cost company and average schedule companies for "look-a-like" purposes were inconclusive. *See* NECA Reply (Mar. 4, 1988), Appendix A at 29-31 and references cited therein. The studies identified by Mr. Quinnan suggest that similar undertakings would have proven to be futile; a conclusion that was confirmed by NECA's independent studies. *See id.* at 30-31.

[106] *See id. Compare* ICORE Reply (Apr. 4, 1988) and appendices *with* NECA Supplemental Comments (May 13, 1988) at 24 [Although ICORE contends that the theoretical benefits of alternative tests outweigh any need to revise the schedules, until those tests are performed their asserted benefits are merely speculative. In NECA's view, the benefits "of revising the average schedules to conform to the new access charge environment clearly outweighed the minor and speculative benefits to be gained from such alternative allocation methodologies."]. As noted earlier, settlements data (and cost studies for companies that receive interstate compensation on the basis of such studies) are not final until 24 months have elapsed from the month in which exchange carriers provide NECA with estimated settlements (and cost) data. The exercise of reasonable judgment is necessarily incident to such a process. *See* NECA Reply (Mar. 4, 1988) at Appendices B, C; NECA Supplemental Comments (May 13, 1988) at Appendix B.

[107] *See, e.g.*, ICORE Comments (Jan. 5, 1988) at 52. *But see* NECA Average Schedule Information Request Responses at 28-11 to 28-21, NECA Reply (Mar. 4, 1988) at 98-99, Appendix A at 62-66.

[108] *E.g.*, NECA Reply (Mar. 4, 1988), Appendix A at 62-66 and references cited therein; NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 28-8 to 28-21.

[109] *See* NECA Reply (Mar. 4, 1988), Appendices A, B.

[110] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 6-1 to 6-21, 1-1 to 1-2, 26-1 to 27-2; *City of Brookings* Joint Appendix at 402-1340; *see id.* at 402, para 3. ICORE correctly notes that NECA did not provide the data that it erased that were used to construct the scattergram for the flash-cut. ICORE Reply (Apr. 4, 1988) at 38. Those data, however, were not used to construct NECA's September 17, 1985 revisions to the average schedules, but were used instead to determine where the transition flash-cut should begin for companies that were receiving settlements that were estimated by NECA to be excessive. *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 26-28, 1-5. ICORE has not stated that any other data that are necessary to calculate the settlement schedules are missing. ICORE Reply Comments (Apr. 4, 1988), *passim*. The missing demand data that formed the basis for the flash-cut are discussed separately in our discussion of the validity of the 15.9 messages/access line estimate that NECA employed for the flash-cut. ICORE's bald claim that NECA "destroyed much of the data" necessary to an analysis of the filing, given the record before us, we must dismiss as exaggerated.

[111] NECA Average Schedule Information Request Responses (Sept. 15, 1987) at Tabs 9, 12, 14, 16, 19, 23, 18. NECA Modifica-

tion and safeguard procedures[113] that were used in preparing the revisions to the average schedules that NECA proposed on September 17, 1985.[114] NECA has provided sworn testimony[115] from the principals who were directly involved at NECA in the preparation of the revisions to the settlement schedules.[116] We find that testimony to be credible, and we also find that the statements of NECA, and its affiants, with respect tothe data, methodologies, verification, and safeguard procedures that NECA employed are also credible. In contrast, ICORE has provided three affidavits from the same affiant,[117] that are, in many respects, directly contradicted or otherwise called into substantial question by affidavits from that affiant's former associates in the 1984-1985 average schedule development process as well as by NECA's comments, data responses and by other affidavits and information that are contained in the record of this proceeding.[118] Much of ICORE's arguments in favor ofcontinued ARPM settlements appears to be based on a misunderstanding or mischaracterization of previous revisions to the settlement schedules[119] as the result of calculations from more fully documented scientific studies that were reviewed by exchange carriers,[120] while implying that the amount of time that was available to NECA was sufficient to permit NECA to acquire data and perform the calculations, statistical testing, and modelling that were suggested by ICORE before revisions to the average schedules were proposed.[121] However, the total record in this proceeding leads us to conclude: (1) that the revisions proposed on September 17, 1985 are sufficiently documented, and, in fact, may be more fully documented than was the case with any prior revision (with the possible exception of the 1974 revision that was referenced as having been associated with Dr. Brousseau's dissertation);[122] (2) that NECA's documentation as to accuracy, verification, appropriateness of data utilized, computations performed, formulas tested, procedures employed, and adequacy of the measures taken to ensure both the accuracy and correctness of the settlement schedules that it proposed was, and is, adequate;[123] and (3) that NECA's filings establish

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tion of Average Schedules (Sept. 17, 1985), NECA Reply (Jan. 6, 1986), NECA Reply (Mar. 4, 1988), Supplemental Reply (May 13, 1988), *passim*.

[112] NECA Average Schedule Information Request Responses at Tabs 7-10, 14, 17, 19, 20, 22; NECA Reply (March 4, 1988) at Appendices A-C, E, F; NECA Reply Comments (Jan. 6, 1985).

[113] NECA Average Schedule Information Request responses (Sept. 15, 1987) at Tabs 11, 15, 18, 25, 27, 30.

[114] NECA Modification of Average Schedules (Sept. 17, 1985), NECA Reply (Jan. 6, 1986), NECA Reply (Mar. 4, 1988), NECA Supplemental Comments (May 13, 1988), *passim*.

[115] *See* NECA Reply (Mar. 4, 1988), Appendices G, A, D, F.

[116] *Id.*

[117] Affidavit of Mr. Jan Reimers (Jan. 23, 1986), ICORE Response (Feb. 7, 1986), Exh. A, ICORE Comments (Jan. 5, 1986), Exh. A; Affidavit of Mr. Jan Reimers (Dec. 18, 1987), ICORE Comments (Jan. 5, 1988), Exh. A; Affidavit of Mr. Jan Reimers (Mar. 31, 1988), ICORE Reply (Apr. 4, 1988), Exh. B. The letters and comments that were provided by other consultants (Ms. Upchurch, Dr. Brousseau, and Mr. Coo) were unattested, directed to Mr. Reimers, and do not clearly establish that Mr. Reimers provided complete data or information to those consultants. Indeed, Dr. Tepping, upon whom ICORE relied in its initial reply comments (ICORE Reply Comments of Jan. 6, 1986, Appendix A) subsequently repudiated his initial assessment in an affidavit after receiving more complete information. *See* NECA Reply (Mar. 4, 1988) at Appendix C; NECA Supplemental Comments (May 13, 1988) at Appendix A. *Compare id.* with ICORE Comments (Apr. 4, 1988) and Exhibits A-E, ICORE Comments (Jan. 5, 1988) and Appendices at Tabs A-D, ICORE Reply Comments (Jan. 6, 1986) at Exhibits B-D, ICORE Comments (Dec. 6, 1985) at Exhibits A-C, *passim*. Incomplete information in the hands of ICORE's consultants may, in fact, explain in part some of the contradictions that exist in the record between ICORE consultants' statements and matters about which no apparently legitimate dispute could exist. For example, Ms. Upchurch states "the alternative model analysis was quite limited... NECA typically considered straight line models, *ignoring potential improvement of other linear models (such as higher order equations)*. By only considering correlations, they implied that a variable could not predict another variable unless the relationship was a straight line." ICORE Comments (Jan. 5, 1988), Tab B, Statistical Evaluation of National Exchange Carrier's Average Schedule Revision Based on NECA's September 15, 1987 Filing at 5-6 (emphasis supplied). In contrast, the NECA materials that Ms. Upchurch purportedly reviewed stated, explicitly, that logarithmic, polynomial, and hyperbolic forms were evaluated and utilized to the extent appropriate during the average schedule development process. *See* NECA Average Schedule Information Request Responses (Sept. 15, 1987) at 28-23 to 28-26, 28-36 to 28-40; NECA Reply (Mar. 4, 1988), Appendix A. Moreover, the schedules themselves, filed on September 17, 1985, were, by their own terms, not straight line relationships. *1985 Proposed Revisions* Appendix A at 14-18. *See also id.* at 6 ["All formulas were tested for linear, quadratic, exponential, logarithmic, and inverse relationships between revenue requirement per demand unit and ratios of demand units... The formulas with the best statistical fit to the data and the most logical relationships were selected, one for common line, one for traffic sensitive, and one for billing and collection."]. As Mr. Quinnan pointed out in his affidavit, the "common line formula is an asymptotic form consisting of two straight lines joined at a spline point. The traffic sensitive formula is a hyperbolic form relating the cost per minute to the reciprocal of minutes per exchange. The billing and collection function is a quadratic form relating cost per message to messages per line. None of the formulas are straight lines." NECA Reply Comments (Mar. 4, 1988), Appendix A at 58-59.

[118] *Compare id. with* NECA Reply (Mar. 4, 1988) and Appendices, NECA Average Schedule Information Request Responses (Sept. 15, 1987), NECA Reply (Jan. 6, 1986), NECA Supplemental Reply (May 13, 1988), *City of Brookings* Joint Appendix at 402-1158.

[119] *See, e.g.,* ICORE Comments (Jan. 5, 1988) and Appendices A, B; ICORE Reply (Apr. 4, 1988) and Appendix B, *passim*. As revealed in the appendices to the comments and replies of both ICORE and NECA, with the exception of the initial 1970-1974 study, subsequent average schedule revisions did not embody valid, scientific studies.

[120] *See, e.g.,* ICORE Reply Comments (Jan. 6, 1986)) at i ["Historically, the average schedule revisions have been implemented in a scientific manner. ..."]; *id.* at 5 ["Past revisions were based on verifiable statistical analyses... (which)... also made it possible for the industry to understand and verify how the average schedules had been calculated."].

[121] *See* ICORE Comments (Jan. 5, 1988), ICORE Reply (Apr. 4, 1988), *passim* and references cited therein.

[122] *See* NECA Reply (Mar. 4, 1988), Appendix A at 11-13, Appendix D at 9; ICORE Reply (Apr. 4, 1988), Exhibit B at 5.

[123] We find that it was not necessary in this case for NECA to provide the calculations, for confirmation of the mathematical accuracy, of each arithmetic operation that NECA performed. For example, NECA (NECA's September 15, 1987 Average Schedule Information Request Responses at 28-11) states that it utilized the Lagrange multiplier technique to insure that the combination of two equations identified at 28-10 meet precisely "at the limit Xo." NECA did not, however, show each of the arithmetic calculations that were involved. On the other hand,

that NECA's September 17, 1985 revisions to the average schedules were, and are, in compliance with Section 69.606(a) of the Commission's rules.[124] In short, we find ourselves in agreement with Dr. Koyak when he concluded that there was "no evidence to suggest that NECA's data analysis is suspect on statistical grounds."[125] Dr. Koyak also concluded that he did "not believe that the analyses would have been improved had NECA tailored its analyses to conform to ICORE's criticisms." [126] While we also concur in that assessment because of the data, resources, and time constraints that were present at the time that NECA was proposing its initial revisions to the average schedules, we do not wish to convey the impression that improvements are not possible with respect to future revisions to the average schedules. For example, NECA's October 3, 1988 proposed revisions to the average schedules contained supporting documentation and data that were more logically organized and developed than was the case with the documentation and filings that are before us in this remand proceeding. As noted above, we expect that the quality of NECA's filings in the average schedule area will continue to improve with each successive year.

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virtually anyone familiar with Lagrangian multipliers would have been able to replicate a comparable result. Even so, NECA continued the development of the mathematical formulation for calculating the settlement schedules (*id.* at 28-12 through 28-21). With respect to ICORE's criticisms of NECA's failure to provide the calculations (*see, e.g.,* ICORE Comments (Jan. 5, 1988) at 49-53, ICORE Supplemental Comments (Apr. 4, 1988) at 37-40; *compare id. with* NECA Reply (Mar. 4, 1988) at 98-99, NECA Average Schedule Information Request Responses of September 15, 1987 at 28-11), it appears that ICORE is contending that NECA was obligated to provide, for the record, the exact numerical result of every arithmetic operation involving every datum that was utilized in computing the settlement schedules (*i.e.,* in the case of the arithmetic summation of consecutive integers from 1 to 5 [a verbal description], which could be calculated by the formula $n(n+1)/2$ where n = the maximum integer value [a formula description], NECA, under ICORE's standard would be required to show either that $1+2+3+4+5 = 15$, or that $5(5+1)/2 = 15$. Either way, a proof requirement of this sort would be unreasonable, if not absurd, given the tens of millions of individual arithmetic computations that were necessarily performed by computer in developing revisions to the settlement schedules. We also note that the arithmetic errors that were initially identified by ICORE (ICORE Comments of December 6, 1985 at 23) as present in NECA's filing in the initial phase of this proceeding were corrected on December 12, 1985, and had not, in fact, occurred during the average schedule development process. *See* Letter from G. R. Evans, NECA Director -Tariff and Regulatory Matters, to Mr. William J. Tricarico, Secretary, Federal Communications Commission dated December 12, 1985 and references cited therein.

[124] *Accord* NECA Reply (Mar. 4, 1988), Appendix E at 3, Appendices B, F.

[125] Affidavit of Dr. Robert Koyak, NECA Supplemental Reply (May 13, 1988), Appendix B at 4. Dr. Koyak also concluded that NECA had "employed sound statistical reasoning in guiding its determinations... that the challenges posed by ICORE to the soundness of NECA's procedure are unfounded, and that doubt should not be cast upon it for reason of statistical invalidity." *Id.* at 1. *Accord* Affidavits of Drs. Tepping and Koyak, NECA Reply (Mar. 4, 1988) at Appendices C. B.

[126] NECA Supplemental Reply (May 13, 1988), Appendix B at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-78

In the Matter of

Amendment of Section 73.202(b),	RM-7582
Table of Allotments,	
FM Broadcast Stations.	
(Osceola, Arkansas and Millington,	
Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1991 Released: November 14, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 1845 (1991), issued in response to a petition filed on behalf of Diamond Broadcasting, Inc. ("petitioner"), licensee of Station KPYR(FM), Channel 251C, Osceola, Arkansas, proposing the allotment of its channel to Millington, Tennessee, and modification of its license accordingly. Petitioner filed supporting comments in response to the *Notice* reiterating its intention to apply for the channel, if allotted. Clarence Medlin ("Medlin") and Dickie Kennemore, Mayor of Osceola ("Kennemore"), each filed informal comments, to which petitioner responded.[1] Petitioner also filed supplemental comments.[2]

2. We believe the public interest would be served by reallotting FM Channel 251C from Osceola, Arkansas, to Millington, Tennessee, and by modifying the license for Station KPYR(FM), as requested. Our determination is based upon the petitioner's showing that the reallotment proposal will provide Millington (population 20,236),[3] with its first local FM transmission service,[4] while Osceola (population 8,881) will continue to receive local aural transmission service from fulltime Station KOSE(AM).[5]

3. Channel 251C can be allotted to Millington at the petitioner's presently licensed transmitter site consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules,[6] as Station KPYR(FM) currently places a 70 dBu signal over the entire community of Millington. Thus, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KPYR(FM) to specify Millington, Tennessee, as its community of license on Channel 251C, in lieu of its present use at Osceola, Arkansas.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Osceola, Arkansas	297A
Millington, Tennessee	251C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Diamond Broadcasting, Inc. for Station KPYR(FM), IS MODIFIED effective **December 30, 1991,** to specify operation on Channel 251C at Millington, Tennessee, in lieu of Osceola, Arkansas, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the license (BLH-900620KA) except the community, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the license (BLH-900620KA) except for the community as specified above, and a license application (Form 302) is filed within ten (10) days of commencement of program tests.

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[1] Both Medlin and Kennemore's comments are procedurally defective in that neither party filed a sufficient number of copies. *See* Commission Rule 1.420(e). Furthermore, Kennemore's comments were untimely, in violation of Rule 1.415, and Medlin failed to include his address, in violation of Rule 1.52. Therefore, these comments, and petitioner's responsive comments, will not be formally considered.

We note that Medlin and Kennemore oppose the proposal. Both request, if the petition is granted, the allotment of a new channel to Osceola. Neither party filed a counterproposal requesting the allotment of a new channel to Osceola in this proceeding. However, we note that Channel 297A has recently been allotted to Osceola. *See Memorandum Opinion and Order* in MM Docket No. 87-619, 6 FCC Rcd 4579 (1991).

[2] These comments, which advise us of our allotment of Channel 297A to Osceola, were accompanied by a motion to accept. Since the comments merely contain information of which we would take official notice in any event, no prejudice will ensue from acceptance.

[3] Population figures are from the 1980 U.S. Census.

[4] Millington is also served locally by fulltime Station WMPS(AM).

[5] The presence of vacant but applied for Channel 297A in Osceola was not considered in resolving petitioner's proposal, as an applied for allotment does not constitute an "existing service." *See Community of License MO&O*, 5 FCC Rcd 7094, 7097 (1990).

[6] Coordinates at the licensed site of Station KPYR-FM are 35-28-03 and 90-11-27.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Diamond Broadcasting, Inc., licensee of Station KPYR(FM), is required to submit a rule making fee or proof that it has paid the fee in addition to the fee required for the applications to effect the change in community of license.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-52

In the Matter of

Amendment of Section 73.202(b), RM-7373
Table of Allotments,
FM Broadcast Stations.
(Macclenny and Williston,
Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1991; Released: November 14, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 1480 (1991), proposing the substitution of Channel 221C3 for Channel 221A at Macclenny, Florida, and modification of the license of WJXR, Inc. ("WJXR"), for Station WJXR(FM), Channel 221A, accordingly. The *Notice* also proposed the substitution of Channel 267A for Channel 221A at Williston, Florida, and the modification of the license of Gulf-to-Bay Broadcasting Co. Inc., for Station WFEZ(FM), Channel 221A, Williston in order to accommodate the upgrade at Macclenny.[1] An *Order to Show Cause* was issued to Station WFEZ(FM) directing the licensee to demonstrate why its license should not be modified to specify operation on Channel 267A in lieu of Channel 221A at Williston. The *Notice* stated that the Macclenny substitution would be short-spaced to two applications for noncommercial educational FM stations on Channel 220A. We served these applicants, Ocala Radio Ministries, Inc. ("Ocala"), at Saint Augustine, Florida, and Putnam Radio Ministries, Inc. ("Putnam"), at Palatka, Florida, with copies of the *Notice*. Ocala and WJXR each filed comments and reply comments. In addition, after the record closed, Ocala and WJXR filed a joint request for approval of a settlement agreement in which Ocala withdrew its comments and reply comments.[2]

2. WJXR in its comments states that it is the only licensed service to Macclenny and its proposal would provide the first wide FM coverage area to that community. Further, WJXR states that Putnam's proposal will provide second local FM service and the fourth local audio service to Palatka. Therefore, WJXR states that the proposals should be considered under allotment priority four, other public interest matters.[3] WJXR claims that its upgrade would serve an additional 357,229 persons in an area of 4,656.9 square kilometers. Furthermore, Station WFEZ(FM) could operate as a 6 kilowatt Class A station, thereby serving an additional 32,250 persons in an area of 2,549.8 square kilometers. WJXR contends that its proposal should be preferred over the Palatka station application, citing *Andalusia, Alabama,* 49 FR 32201, August 13, 1984.

3. WJXR argues that although adoption of its proposal would preclude grant of Palatka's application on Channel 220A at the specified site, an alternative channel is available within the noncommercial educational FM band for use by the Palatka applicant. WJXR states that its engineering analysis determined that Channel 217 is available for use at Palatka. Thus, the availability of noncommercial educational service in Palatka will not be significantly affected by WJXR's proposal.

4. Based on the above, we believe the public interest would be served by substituting Channel 221C3 for Channel 221A at Macclenny and Channel 267A for Channel 221A at Williston, and modifying the authorizations for Stations WJXR(FM), Macclenny, and WFEZ(FM), Williston, accordingly. The licensee of Station WFEZ(FM), Williston, Florida, filed no response to the *Order to Show Cause* as to why its license should not be modified to specify operation on Channel 267A in lieu of Channel 221A. Accordingly, pursuant to Section 1.87 of the Commission's Rules, the licensee is deemed to have consented to the proposed modification. WJXR has stated its willingness to reimburse the licensee of Station WFEZ(FM) for the reasonable costs in changing its frequency and will be required to do so pursuant to Commission guidelines. *See Circleville, Ohio,* 8 FCC 2d 159 (1967).

5. Ocala's willingness to amend its application for Channel 220A, Saint Augustine, removes any conflict between its application and the Macclenny substitution. The applicant for Channel 220A at Palatka did not respond to the *Notice*. Therefore, we consider its application as a site preference. Rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Alabama,* 49 FR 32201, August 13, 1984, and *Las Vegas, Nevada,* 51 FR 9453, March 19, 1986. Palatka will be served with a copy of this *Order* and given

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[1] George E. Mills, Jr., successor in interest to Gulf-to-Bay Broadcasting Co. Inc. filed comments noting that on November 16, 1989, the FCC granted an involuntary assignment of license for Station WFEZ(FM) from Gulf-to-Bay Broadcasting Co. Inc. to Mills as Trustee (BALH-891108GQ). Mills requested that all filings relating to Station WFEZ(FM) be directed to him.

[2] In this agreement, Ocala agrees to amend its application to specify a nonconflicting site. In accordance with Section 1.420(j) of the Commission's Rules, Ocala states that it will not receive compensation in excess of its legitimate and prudent expenses in exchange for the withdrawal and amendment of its application. Although the Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period, we believe acceptance is in the public interest, because this agreement resolves conflicting issues in this proceeding. Therefore, Ocala's comments are moot and will not be discussed.

[3] *See Revision of FM Assignment Policies and Procedures,* 90 FCC 2d 88 (1982), which are (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local aural service; (4) Other public interest matters. [Co-equal weight given to priorities (2) and (3)].

an opportunity to amend its application accordingly. In addition, we note that Channel 217A may be available for use at Palatka.[4]

6. Channel 221C3 can be allotted to Macclenny in compliance with the Commission's minimum distance separation requirements at Station WJXR's licensed site 10.5 kilometers (6.5 miles) east of the community, in order to avoid short spacings to the sites specified in the construction permits for Station WNLE(FM), Channel 219C2, Fernandina Beach, Florida, and Station WZAZ(FM), Channel 224A, Green Cove, Florida. Channel 267A can be allotted to Williston in compliance with the Commission's minimum distance separation requirements at Station WFEZ(FM)'s current license site 10.5 kilometers (6.5 miles) west of Williston.[5]

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Macclenny, Florida	221C3
Williston, Florida	267A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WJXR, Inc., for Station WJXR(FM), Macclenny, Florida, IS MODIFIED, to specify operation on Channel 221C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license George E. Mills, Jr. for Station WFEZ(FM), Williston, Florida, IS MODIFIED, to specify operation on Channel 267A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-851112KH except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-851112KH except for the channel as specified above and a license application is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicants at Saint Augustine and Palatka, Florida, and to the licensee of Station WFEZ(FM) as follows:

George E. Mills, Jr.,
Trustee
Station WFEZ(FM)
9334 Bay Vista
Estates Boulevard
Orlando, Florida 32819

Ocala Radio
Ministries, Inc.
P.O. Box 2
Ramey, Puerto Rico 00604

Putnam Radio
Ministries, Inc.
3111 St. Johns Avenue
Palatka, Florida 32177

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] We also note that while Palatka currently has no authorized noncommercial educational transmission service, Station WYFB, Channel 213C1, Gainesville, Florida, provides noncommercial educational reception service to the community.

[5] The coordinates for Channel 221C3 at Macclenny are North Latitude 30-17-54 and West Longitude 82-00-55. The coordinates for Channel 267A at Williston are North Latitude 29-25-04 and West Longitude 82-32-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-337

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Muskegon Heights,[1] Michigan)	RM-7138

NOTICE OF PROPOSED RULE MAKING

Adopted: November 1, 1991; Released: November 14, 1991

Comment Date: January 6, 1992
Reply Comment Date: January 21, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Pathfinder Communications Corporation ("petitioner"), requesting the substitution of Channel 269B1 for Channel 269A, Muskegon Heights, Michigan. Petitioner also requests modification of its license for Station WQFN-FM (formerly WQWQ-FM), Channel 269A, to specify operation on Channel 269B1.[2] Petitioner filed information in support of the proposal and indicated it would file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide a wide coverage area station to Muskegon Heights, Michigan. Channel 269B1 can be allotted to Muskegon Heights in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[3] Since Muskegon Heights is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. We shall also propose to modify the license for Station WQFN-FM, Channel 269A, to specify operation on Channel 269B1 in accordance with Section 1.420(g) of the Commission's Rules, and will not accept competing expressions of interest for use of the channel or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following community:

	Channel No.	
City	Present	Proposed
Muskegon Heights, Michigan	269A	269B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 6, 1992,** and reply comments on or before **January 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel as follows:

Peter Tannenwald
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] Channel 269A was allotted to Muskegon Heights, Michigan, in Docket No. 19160, *Second Report and Order,* released November 5, 1971. The FM Table of Allotments lists Channel 269A at Muskegon instead of Muskegon Heights. The Table will be corrected upon termination of this proceeding.

[2] Petitioner initially filed this petition when Furniture City Broadcasting Company was the licensee of Station WQWQ-FM. Petitioner requested the substitution to enable its Station WCUZ-FM, Grand Rapids, Michigan, to relocate its transmitter in order to provide full coverage to its community of license. The petition was returned by letter based on the fact that our policy does not provide for the forced upgrade of a station to accommodate another station's desire to upgrade or relocate its transmitter. Petitioner filed a petition for reconsideration of that denial, which was placed on public notice November 24, 1989 (Report No. 1802).

On March 30, 1990, the licensee for Station WQWQ-FM was assigned to Pathfinder Communications Corporation from Furniture City Broadcasting Company. Therefore, as the licensee, petitioner is now able to request this substitution. As a result, we regard the petition for reconsideration as moot and will dismiss it at the termination of this proceeding.

[3] The coordinates for Channel 269B1 are 43-16-39 and 86-20-00.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-388

In the Matter of

Amendment of Section 73.202(b),	RM-7229
Table of Allotments,	RM-7569
FM Broadcast Stations.	
(Crossville and Hilham,	
Tennessee)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1991; Released: November 14, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Mountaintop Broadcasters, Inc. ("petitioner"), licensee of Station WEGE-FM, Channel 273A, Crossville, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 5356 (1990), proposing the substitution of Channel 273C3 for Channel 273A at Crossville, and the modification of its license for Station WEGE-FM to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to apply for Channel 273C3 if allotted to Crossville. Border Communications ("Border") filed a counterproposal.[2] Crossville Radio, Inc. ("Crossville"), licensee of Station WXVL-FM, Channel 257A, Crossville, Tennessee, filed untimely comments and a motion to accept late filed comments. Petitioner and Crossville filed reply comments.[3]

2. In its counterproposal, Border requests the allotment of Channel 274A to Hilham, Tennessee, as that community's first local aural service. In support of its request, Border states Hilham is a community serving the Dale Hollow Lake and recreational areas, and contains "various commercial enterprises, churches, a Fire Department, a U.S. post office, and is recognized in the Rand McNally Commercial Atlas."

3. In response to Border's counterproposal, petitioner states that Channel 274A cannot place a city grade contour over Hilham. Petitioner also asserts that Hilham is not a "community" for purposes of allotting FM radio stations. Petitioner notes that Hilham has no municipal government and is not incorporated as a municipal unit. Further, petitioner describes Hilham as a wide spot on the road with only one store, a small church, and one gas station. It argues the fire truck located in Hilham is for the Overton County fire department. Although petitioner acknowledges the existing of a U.S. post office, it submits that the Hilham postal service employee estimates that Hilham consists of approximately twenty homes with 50-100 residents. Finally, petitioner contends that Channel 284A could provide service to Hilham while allowing petitioner to upgrade its facilities at Crossville.

4. Based upon the showing submitted by Border, we do not believe that Hilham is a community for allotment purposes. The Commission's long standing policy is to allot channels to communities composed of geographically identifiable population groupings. This requirement is generally satisfied if the proposed community is either incorporated or listed in the U.S. Census. Although the 1991 edition of the *Rand McNally Commercial Atlas* lists Hilham as having a population of 105, the town is neither incorporated nor listed in the U.S. Census. In this regard, the Commission has stated that mere geographical location is not sufficient to establish "community status." *See Vimville, Mississippi*, 48 FR 5974 (1983), and *Hannibal, Ohio*, 6 FCC Rcd 2144 (1991). In addition, Border provided no information as to the existence of any local government or other indicia of community status such as political, social, or business organizations, aside from a store, a church and a gas station. Although Hilham has a post office, the presence of a post office is not sufficient to establish community status. *See Hannibal, Ohio, supra.* Therefore, we find that there is insufficient indicia to warrant a determination that Hilham is a community for allotment purposes.[4]

5. Having determined that Hilham is not eligible for an FM allotment, we believe the public interest would be served by substituting Channel 273C3 for Channel 273A at Crossville, since it would provide Crossville with an expanded coverage area FM service. Channel 273C3 can be allotted to Crossville in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.7 kilometers (5.4 miles) north to accommodate petitioner's desired site.[5] As proposed, we will also modify petitioner's license for Station WEGE-

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[1] The community of Hilham, Tennessee, has been added to the caption.

[2] Public Notice of the counterproposal was given on December 12, 1990.

[3] Crossville claims its comments were delayed by one day due to a problem with the service used to deliver the comments to the Commission. We deny Crossville's request to accept its late filed comments. It is the responsibility of the party submitting comments to ensure that documents are delivered to the Commission on time. *See Gosnell, Arkansas, et al.*, MM Docket No. 87-619, 4 FCC Rcd 6170 (1989). Therefore Crossville's comments and the responsive reply comments of petitioner will not be considered.

We note that Crossville objects to petitioner's proposal on the grounds that Crossville "will suffer severe economic injury if this upgrade is approved." Crossville states that it cannot upgrade on its present channel and suggests that the Commission initiate a hearing to determine which station should receive an upgrade. However, the Commission does not consider arguments regarding possible economic injury in allotment proceedings. *See Revision of FM Channel Policies and Procedures*, 90 FCC 2d 88 (1982). Therefore, even if we were to consider Crossville's comments, we would not grant the relief Crossville seeks.

[4] Furthermore, a Commission engineering analysis has determined that there may be a serious line-of-sight problem to Hilham from the proposed site.

[5] The coordinates for Channel 273C3 at Crossville are North Latitude 36-01-25 and West Longitude 85-00-06.

FM to specify operation on Channel 273C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Crossville, Tennessee	257A, 273C3

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Mountaintop Broadcasters, Inc., for Station WEGE-FM, Crossville, Tennessee, IS MODIFIED to specify operation on Channel 273C3, in lieu of Channel 273A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the petition for Rule Making filed by Border Communications (RM-7569) requesting the allotment of Channel 274A to Hilham, Tennessee, IS DENIED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-549

In the Matter of

Amendment of Section 73.202(b),	RM-6744
Table of Allotments,	RM-7292
FM Broadcast Stations.	
(Muskegon and Manistee,	
Michigan)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 1, 1991; Released: November 14, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8457 (1989), seeking the substitution of Channel 300B1 for Channel 300A at Muskegon, Michigan, and modification of the construction permit for Station WMHG-FM to specify the higher class channel. The *Notice* was issued in response to a petition filed by Richard L. Culpepper ("petitioner").[1] To accommodate petitioner's proposal, it would be necessary to substitute Channel 268A for vacant but applied for Channel 300A, Manistee, Michigan. Petitioner filed comments restating his interest in Channel 300B1 at Muskegon. Patrick L. Lopeman ("Lopeman") filed a counterproposal.[2] Petitioner filed reply comments and Pathfinder Communictaions Corporation ("Pathfinder") filed an opposition to the counterporposal.[3]

2. Lopeman counterproposed the substitution of Channel 268C3 for Channel 300A at Manistee rather than the substitution of Channel 268A for Channel 300A as proposed in the *Notice*. Lopeman states that the window for Channel 268A was open from January 10, 1989, until February 9, 1989, with no applications received during that time. Lopeman submits that a possible reason for lack of interest in the channel at Manistee could be that a Class A station, as a second local transmission service, could be a "shaky venture", whereas a higher class channel with greater coverage would be economically more attractive. Lopeman stated his intention to file an application for Channel 268C3 at Manistee.

3. Pathfinder, licensee of Station WQFM-FM (formerly WQWQ-FM),[4] opposes the allotment of Channel 268C3 at Manistee because its pending request to substitute Channel 269B1 for Channel 269A at Muskegon Heights, Michigan, is mutually exclusive with Lopeman's counterproposal to substitute Channel 268C3 for Channel 300A, Manistee.[5] Pathfinder argues that the upgrade at Manistee is not required to achieve the upgrade for Station WMHG-FM and could be considered separately at a later date once a permittee has been selected. Pathfinder further argues that Lopeman's counterproposal should be dismissed or a further notice of proposed rule making be initiated, comparing Channel 269B1, Muskegon Heights and Channel 268C3, Manistee.

4. Lopeman's counterproposal requesting Channel 268C3 instead of Channel 268A was accepted based on the fact that the channel was vacant and unapplied for at the time the counterproposal was filed. Had the channel remained vacant and the counterproposal been granted, a new filing window would have been opened for the channel, since the higher class channel would be made available in Manistee for the first time. *See Report and Order (Lafayette, Louisiana)*, 2 FCC Rcd 7303 (1987); *recon. denied, Memorandum Opinion and Order*, 3 FCC Rcd 4614 (1988); *rev. denied, Memorandum Opinion and Order*, 4 FCC Rcd 5073 (1989); *aff'd sub nom. C. R. Crisler v. FCC*, 919 F.2d 182 (D.C. Cir. 1990); *see also Memorandum Opinion and Order (Arlington, Texas and Durant, Oklahoma)*, 6 FCC Rcd 2050 (1991). However, three applications have been filed for Manistee Channel 268A.[6] As one of the applicants for the Class A channel at Manistee, Lopeman is ineligible to request an upgrade pursuant to Section 1.420(g)(3) of the Rules. In addition, the grant of this (counterproposal would result in the opening of a new filing window for the channel and the three applicants would lose cut-off protection to amend their applications, thereby facing additional competing applications. Accordingly, for these reasons, we dismiss Lopeman's counterproposal. Dismissal of this counterproposal removes any conflict between Lopeman's and Pathfinder's petitions. As a result, we adopt, simultaneously with this action, a *Notice of Proposed Rule Making* (RM-7138) to solicit comment on Pathfinder's proposal for Muskegon Heights.

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[1] The assignment of the construction permit for Station WMHG-FM from Richard L. Culpepper to W.M.H.G. Adrian Broadcasting Co., a company wholly owned by Richard L. Culpepper, was granted on August 22, 1990.

[2] Public Notice of the counterproposal was given on February 27, 1990, Report No. 1808 (RM-7292).

[3] The following comments were filed pursuant to Commission Rule 1.415(d) after the pleading cycle ended and have not been accepted for consideration. Pathfinder filed a report of changed circumstances; Lopeman, by letter, further expressed his interest in a channel at Manistee; and petitioner filed a motion to strike the letter filed by Lopeman.

[4] The assignment of license for Station WQWQ-FM, Muskegon Heights, from Furniture City Broadcasting Company to Pathfinder was granted on February 13, 1990 (BALH-891201GP) and consumated on March 30, 1990.

[5] Pathfinder requested the substitution of Channel 269B1 for Channel 269A at Muskegon Heights to enable its Station WCUZ-FM, Grand Rapids, Michigan, to relocate its transmitter in order to provide full coverage to its community of license. Furniture City Broadcasting Company was the licensee of Station WQWQ-FM, Muskegon Heights, at the time Pathfinder filed the petition. Pathfinder's petition was returned without action on the grounds that Commission policy does not provide for the forced upgrade of a station to accommodate another station's desire to upgrade or relocate its transmitter. Pathfinder filed a petition for reconsideration of this action. However, now that Pathfinder is the licensee of Station WQWQ-FM, it may request an upgrade for the Muskegon Heights station.

[6] BPH-900410MH (Patrick Lopeman/American Broadcasting Financial Corporation), BPH-900423MZ (Todd Noordyk) and BPH-900518MQ (Caroline K. Powley).

5. Based on the above, we believe the public interest would be served by the substitution of Channel 300B1 for Channel 300A, Muskegon, Michigan, and modification of the license for Station WMHG-FM to specify operation on Channel 300B1. Channel 300B1 can be allotted to Muskegon in compliance with the Commission's spacing requirements at petitioner's specified site.[7] We shall also substitute Channel 268A for Channel 300A at Manistee, Michigan, to accommodate Channel 300B1 at Muskegon.[8] The three applicants for Channel 300A, Manistee, will be permitted to modify their applications to specify the new Class A channel. Applicants will retain their cut-off protection, since the channels are equivalent. In addition, Patrick Lopeman/ American Financial Corporation and Todd Noordyke will have to modify their applications to specify new sites for the new channel as well. Channel 268A can be used at Caroline Powley's selected site. We shall also modify the construction permit of Station WMHG-FM, to specify operation on Channel 300B1, in accordance with Section 1.420(g) of the Rules. Since Muskegon and Manistee are both located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been obtained for these allotments. The application for Channel 300B1 at Muskegon must conform to the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding the Commission's monitoring station at Allegan, Michigan.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below:

Community	Channel No.
Muskegon, Michigan	283B, 295B, 300B1
Manistee, Michigan	249A, 268A

7. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WMHG-FM, Muskegon, Michigan, IS MODIFIED to specify operation on Channel 300B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Order to the following applicants for Channel 300A at Manistee, Michigan, and to Pathfinder Communications Corporation:

Patrick Lopeman
American Broadcasting Financial Corp.
4359 So. Howell Ave., No. 106
Milwaukee, Wisconsin 53207
(BPH-900410MH)

Todd Noordyk
5777 West 64th Street
Fremont, Michigan 49412
(BPH-900423MZ)

Caroline K. Powley
1536 Logan Avenue
Altoona, Pennsylvania 16602
(BPH-900518MQ)

Peter Tannenwald
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(Counsel for Pathfinder Communications Corporation)

9. IT IS FURTHER ORDERED, That the counterproposal filed by Patrick L. Lopeman (RM-7292) IS DISMISSED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[7] The coordinates for Channel 300B1 at Muskegon are 43-17-41 and 86-13-12.
[8] The coordinates for Channel 268A at Manistee are 44-14-48 and 86-19-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
November 7, 1991

Released: November 14, 1991

Professor David Berkman 8330-M
730 Homestead Trail C4-613
Grafton, WI 53042

Dear Professor Berkman:

This is in response to your complaint against WISN alleging violation of the Commission's personal attack rule, 47 C.F.R. Section 73.1920. After reviewing your complaint of April 24, 1991, WISN's response of August 14, 1991, to our July 26, 1991, letter of inquiry, and your reply of August 30, 1991, we conclude that WISN has not violated the personal attack rule.

You claim that during the discussion of a controversial issue of public importance, namely, media coverage of the Iraqi war, Mr. Belling, a talk show host on WISN, made the comment that you "won't be happy until we see Iraqi soldiers jumping for joy." You argue that this statement has no interpretation other than that you hoped for a military defeat of the United States. You allege that this statement calls you a traitor to the U.S., and claim that it is an attack upon your character, integrity and like personal qualities.

WISN, in its response to our inquiry, argues that Mr. Belling's statement did not constitute a personal attack because it was not intended to convey that you were a traitor to your country; only that you would be happy, and Iraqi soldiers would be jumping for joy, if American forces withdrew from Kuwait. WISN argues that this statement is not an attack upon your honesty, character, integrity or like personal qualities, and, therefore, no personal attack occurred. In your response to WISN, you reiterate your position that Mr. Belling's statement cannot be interpreted as anything other than an attack upon your patriotism.

We cannot find that WISN's explanation of the intent of Mr. Belling's statement is unreasonable. Its statement is consistent with Mr. Belling's opinion that you wished to see a withdrawal of American troops from Kuwait, which, according to WISN, was the context within which the statement was made. Under the circumstances, we cannot find that Mr. Belling's statement constituted a personal attack.

ACCORDINGLY, your complaint against WISN IS DENIED.

Staff action is taken here pursuant to delegated authority. Application for Review by the Commission may be requested within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) (47 C.F.R. Section 1.4(b)) by writing the Secretary, Federal Communications Commission, Washington, D.C., 20554, stating factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to parties to the complaint. See Commission Rule 1.1115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Chief, Fairness/Political
Programming Branch
Enforcement Division
Mass Media Bureau

cc: WISN
Christopher J. Reynolds, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Telephone Utilities Exchange Carrier Association Petition for Waiver of the Commission's Rules and Regulations regarding the Deferral and Amortization Requirements for Equal Access Expenses — AAD 91-52

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 14, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 27, 1990, the Telephone Utilities Exchange Carrier Association (TUECA)[1] filed a Petition for Waiver of the Commission's requirements regarding the deferral and amortization of equal access expenses.[2] For the reasons set forth herein, we grant TUECA's request.

II. BACKGROUND

2. In the *Equal Access Accounting Order* the Commission required carriers to defer and amortize equal access expenses.[3] Subsequently, in the Reconsideration Order[4] the Commission changed the amortization schedule from an eight-year rolling period to an amortization period ending December 31, 1993. The Commission Reaffirmed all other aspects of the *Equal Access Accounting Order*. The Common Carrier Bureau granted a Petition for Waiver of the deferral and amortization requirements for equal access expenses filed by the Centel Telephone Companies (Centel) to allow Centel to expense non-capital equal access costs as they are incurred.[5] Similar waivers were granted to the United Telephone Systems Companies (UTS),[6] GTE Service Corporation and its affiliated domestic telephone operating companies (the GTOCs) and the Contel Corporation (Contel).[7]

III. TEUCA's PETITION

3. In its Petition, TUECA states that it will convert approximately 86 percent of its central offices to equal access in 1990 and 1991, based on requests from interexchange carriers. TUECA states that the qual access costs of converting these facilities were $306,005 in 1990 and estimates that they will be $239,590 in 1991.[8] These costs represent less that one-half of one percent of TUECA's 1990 interstate revenue requirement. TEUCA argues that amortization of these costs over an extended period of time is unnecessary in light of their insignificant effect on interstate revenue requirements. TEUCA also cites the precedent set by the granting of similar waivers.[9]

IV. DISCUSSION

4. In the *Equal Access Accounting Order*, the Commission established special accounting requirements for equal access expenses to avoid irregular and substantial fluctuations in carriers' interstate revenue requirements. The Commission found that special accounting requirements were needed because its rules contained no specific accounting provisions to cover equal access and network reconfiguration costs...."[10] Although the *Equal Access Accounting Order* was adopted in response to the Bell Operating Companies' (BOCs) Petition for Waiver, we have concluded in the *Centel Waiver Order*, the *UTS Waiver Order* and the *GTE and Contel Waiver Order* that the

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[1] TUECA is a voluntary pool consisting of the following independent telephone companies: Telephone Utilities of Washington, Inc.; Peninsula Telecommunications, Inc.; Inter-Island Telephone Company; Telephone Utilities of Oregon, Inc.; Telephone Utilities of Eastern Oregon, Inc.; Gem State Utilities; Northwestern Telephone Systems, Inc.; Telephone Utilities of Wyoming, Inc.; and Eagle Telecommunication, Inc.

[2] Equal access expenses consist of those initial incremental presubscription costs and initial incremental expenditures for hardware and software related directly to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provision of equal access. Further, the equal access expenses are limited to the costs of converting offices that serve competitive interexchange carriers or of responding to requests for conversion to equal access. These expenses also include the initial incremental administrative costs incurred by the exchange carriers related specifically and solely to the implementation of equal access. Petitions for Recovery of Equal Access and Network Reconfiguration Costs, 50 Fed. Reg. 50910, at para. 18 (*Equal Access Accounting Order)* (1985), *recon. denied* in part and granted in part, 1 FCC Rcd 434 (1986)(*Reconsideration Order).*

[3] *Equal Access Accounting Order, supra* note 2, at para. 38.

[4] *Id.*

[5] The Centel Companies Petition for Waiver of the Commission's Rules and Regulations regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 1486 (1987) (*Centel Waiver Order).*

[6] UTS, Petition for Waiver of the Commission's Rules and Regulations regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 5104 (Common Carrier Bureau 1987) (*UTS Waiver Order).*

[7] GTE Service Corporation, the GTOCs and Contel, Petitions for Waiver of the Commission's Rules and Regulations regarding the Deferral and Amortization of Equal Access Expenses, 2 FCC Rcd 6933 (Common Carrier Bureau 1987) (*GTE and Contel Waiver Order).*

[8] In its Petition on page 2, TUECA estimated its costs at $216,000 in 1990 and $172,000 in 1991. In a letter from Alexander F. Karman, Assistant Vice President, Pacific Telecom, dated August 29, 1991, the equal access cost for 1990 was revised to $306,005. In a letter from Mr. Karman, dated September 23, 1991, the equal access cost for 1991 was revised to $239,590.

[9] TUECA Petition at 2.

[10] *Equal Access Accounting Order, supra* note 2, at para. 6.

Equal Access Accounting Order is applicable to the BOCs and to independent telephone companies unless a waiver is granted.

5. While the *Equal Access Accounting Order* is applicable to all subject carriers, we believe that TUECA's argument in support of granting a waiver from the deferral and amortization requirements for equal access expenses is persuasive. The equal access expenses, $306,005 in 1990 and $239,590 in 1991, are insignificant in magnitude and represent less than one-half of one percent of TUECA's 1990 interstate revenue requirement. Expending costs of this magnitude will not cause the substantial fluctuations in interstate revenue requirements that the deferral and amortization requirements were designed to prevent, and waiver of those requirements would serve the public interest.[11] Therefore, we are granting TUECA a waiver from the deferral and amortization requirements in the *Equal Access Accounting and Reconsideration Orders*.

V. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that the Petition for Waiver of the Telephone Utilities Exchange Carrier Association to expense equal access expenses of $306,005 in 1990 and $239,590 in 1991 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[11] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-108

In the Matter of

Amendment of Section 73.202(b), RM-7690
Table of Allotments,
FM Broadcast Stations.
(Superior, Nebraska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1991; Released: November 15, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of Superior Broadcasting Incorporated ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 2129 (1991), proposing the substitution of Channel 280C3 for Channel 280A at Superior, Nebraska, and the modfiication of Station KRFS-FM's license to specify operation on the higher class channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 280C3 for Channel 280A at Superior, Nebraska, because it could provide the community with a wide coverage area FM service and enable Station KRFS-FM to expand its coverage area. As proposed, we will also modify petitioner's license for Station KRFS-FM to specify operation on the higher class channel. Channel 280C3 can be allotted to Superior in compliance with the Commission's minimum distance separation requirements and can be used at Station KRFS-FM's licensed transmitter site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Superior, Nebraska	280C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Superior Broadcasting Incorporated, for Station KRFS-FM, Superior, Nebraska, IS MODIFIED to specify operation on Channel 280C3, in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Superior Broadcasting Incorporated, licensee of Station KRFS-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 280C3 at Superior are North Latitude 40-01-30 and West Longitude 98-04-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-323

In the Matter of

Amendment of Section 73.202(b), RM-7850
Table of Allotments,
FM Broadcast Stations.
(Clarksville, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 30, 1991; Released: November 15, 1991

Comment Date: January 6, 1992
Reply Comment Date: January 21, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Clarksville Broadcasting Company, Inc. ("petitioner"), licensee of Station WLCQ-FM, Channel 252A, Clarksville, Virginia, requesting the substitution of Channel 252C3 for Channel 252A at Clarksville, and modification of Station WLCQ-FM's license to specify operation on the higher powered channel. Petitioner states that it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 252C3 for Channel 252A at Clarksville, since it could provide the community with a wide coverage area FM service. Channel 252C3 can be allotted to Clarksville in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.3 kilometers (11.4 miles) northwest to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's authorization for Station WLCQ-FM to specify operation on Channel 252C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 252C3 at Clarksville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, this proposal is contingent upon Station WGOL-FM at Lynchburg, Virginia, receiving a license to operate on Channel 250C3 in accordance with its application for construction permit (BPH-910628IF). Therefore, we may not finalize this proceeding until the Lynchburg station is licensed accordingly.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Clarksville, Virginia	252A	252C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the licensee of Station WGOL-FM, Channel 250C3 at Lynchburg, Virginia: Douglas Broadcasting Inc., P.O. Box 11529, Lynchburg, Virginia 24506.

6. Interested parties may file comments on or before **January 6, 1992,** and reply comments on or before **January 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert R. Boyd
Clarksville Broadcasting Company, Inc.
6307 Barrister Place
Olde Belhaven Towne
Alexandria, Virginia 22307
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

[1] The coordinates for Channel 252C3 at Clarksville are North Latitude 36-42-30 and West Longitude 78-44-00.

ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-336

In the Matter of

Amendment of Section 73.202(b), RM-7757
Table of Allotments,
FM Broadcast Stations.
(Leesburg and Unadilla, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 1, 1991; Released: November 15, 1991

Comment Date: January 6, 1992
Reply Comment Date: January 21, 1992

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making, as amended, filed by Rowland Albany Radio, Inc. ("petitioner"), requesting the substitution of Channel 278C3 for Channel 279A at Leesburg, Georgia, and the modification of its construction permit for Station WIKX(FM) to specify the higher class channel. In order to accomplish the upgrade at Leesburg the petitioner suggests the substitution of Channel 260A for vacant but applied for Channel 278A at Unadilla, Georgia.[1] Petitioner states its intention to apply for Channel 278C3, if allotted.

2. In support of its proposal, petitioner states that the substitution of Channel 278C3 for Channel 279A at Leesburg does not preclude FM service to Unadilla due to the availability of an alternate channel at Unadilla. Petitioner asserts that Channel 260A can be used at Unadilla as a full 6 kilowatt service. However, the site coordinates for proposed Channel 260A differ from the site coordinates for allotted Channel 278A at Unadilla.

3. Channel 278C3 can be substituted for Channel 279A at Leesburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.3 miles) southeast of the community.[2] The site restriction is necessary in order to avoid a short-spacing to Station WBKL(FM), Channel 278C1, Callaway, Florida. In addition, Channel 260A can be substituted for vacant but applied for Channel 278A at Unadilla in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.3 kilometers (2.1 miles) northwest of the community.[3] The site restriction is necessary in order to avoid a short-spacing to Station WSGY(FM), Channel 262C, Tifton, Georgia. The site proposed in the application for Channel 278A at Unadilla does not work at Channel 260A. The applicant for Channel 278A will be served with a copy of the *Notice* and, if this proposal is ultimately adopted, will be given the opportunity to amend his application to specify a non-conflicting site without loss of cut-off protection.

4. We shall propose to modify the construction permit for Station WIKX(FM) at Leesburg to specify operation on Channel 278C3, in accordance with Section 1.420(g) of the Commission's Rules. We shall not accept other expressions of interest in the proposed channel for Leesburg.

5. In view of the fact that Leesburg, Georgia, could receive a wide coverage FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Leesburg, Georgia	279A	278C3
Unadilla, Georgia	278A	260A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **January 6, 1992,** and reply comments on or before **January 21, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gary S. Smithwick
Smithwick & Belendiuk, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036
(Counsel for Rowland Albany Radio, Inc.)

8. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicant for Channel 278A at Unadilla, Georgia, as follows:

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[1] Dallas M. Tarkenton has filed an application (BPH-900718MM) for the channel.

[2] The coordinates for Channel 278C3 at Leesburg are North Latitude 31-39-09 and West Longitude 84-05-20.

[3] The coordinates for Channel 260A at Unadilla are North Latitude 32-17-13 and West Longitude 83-45-13.

Dallas M. Tarkenton

100 Wexford Place

Athens, Georgia 30606

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger

Assistant Chief, Allocations Branch

Policy and Rules Division

Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Illinois Consolidated
Telephone Company

ALLTEL Indiana, Inc.
ALLTEL Illinois, Inc.
ALLTEL Michigan, Inc.
ALLTEL Ohio, Inc., and
Western Reserve Telephone Company

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for
Independent Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 15, 1991

By the Chief, Common Carrier Bureau

1. In this order we grant two petitions for waiver of the Commission's equal access rules filed by independent telephone companies (ITCs). In the *ITC Equal Access Order*,[1] the Commission required ITCs to covert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The *ITC Equal Access Order* provided, however, that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. In this order, we consider the petitions for waiver of the equal access implementation requirements filed by Illinois Consolidated Telephone Company (Illinois); and ALLTEL Indiana, Inc., ALLTEL, Illinois, Inc., ALLTEL Michigan, Inc., ALLTEL Ohio, Inc., and Western Reserve Telephone Co. (ALLTEL). Each company received a request for equal access conversion from the same interexchange carrier, MCI Telecommunications Corporation (MCI). Pursuant to the Commission's rules, the companies were required to complete equal access conversion by March 15, 1991. The petitioners state that, for various reasons, they require additional time to implement equal access.

4. On February 21, 1991, Illinois filed a petition requesting an additional six months, until September 15, 1991, to implement equal access in its Mt. Auburn exchange. Illinois states that it began equal access conversion for all of its offices on January 18, 1991, and anticipated completion of the process by March 18, 1991. Illinois states that during the conversion process it discovered that the manufacturer's software upgrade for the Mt. Auburn switch would not permit the signalling and recording required for equal access. Illinois states that it immediately contacted the software manufacturer to resolve the problem. Illinois states that it is currently awaiting delivery of the new software, and it anticipates that delivery and installation of the new software will be completed by September 15, 1991. Illinois adds that this delay affects only the Mt. Auburn exchange and does not affect the equal access conversion of its other offices. Illinois states that it notified the interexchange carrier of the delay, and it has no difficulties with delaying the conversion of the Mt. Auburn Office.

5. On February 25, 1991, ALLTEL filed a petition seeking a waiver for 23 of its offices. ALLTEL states that in April 1986, it implemented a program for equal access conversion and has completed the conversion process in 190 offices. ALLTEL states, however, that equal access implementation in the remaining 23 offices cannot be completed within the three-year time period. ALLTEL seeks short extensions of time (one to seven months) for 17 of its offices, and seeks longer waivers (up to four years and eight months) for 6 offices.

6. ALLTEL requests an additional one month, until April 6, 1991, to complete the conversion of its Gifford, Ogden, Penfield, Royal, and Chesterfield offices. ALLTEL seeks an additional five months, until August 10, 1991, to complete the conversion of its Casey, Greenup, Neoga, Toledo, Gregory, and Lawrence offices. ALLTEL seeks an additional seven months, until October 12, 1991, to complete the process in its Fisher, Foosland, Thomasboro, Tolono, Delphi, and Alger offices. ALLTEL states that "scheduling constraints" have delayed the completion of equal access conversion in these 17 end offices.

7. ALLTEL states that the remaining six offices cannot be converted within the three-year time period because of technical limitations and lack of manufacturer support. ALLTEL states that its Geneva and Lambertville offices are equipped with SP-1 switches that are no longer sup-

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[1] *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III Order, 100, FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tele. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.*, 603 F. Supp. 730 (D.D.C. 1984).

[4] *ITC Equal Access Order*, 100 FCC 2d at 875, para. 50.

ported by the manufacturer and therefore cannot be upgraded to provide equal access. ALLTEL states that the switches in these two offices are scheduled to be replaced within a few years, and the offices will be capable of providing equal access at that time. ALLTEL requests an extension of two years and eight months, until November 15, 1993, for the Geneva office, and an extension of three years and eight months, until November 15, 1994, for the Lambertville office.

8. ALLTEL states that its Pleasant Hill, Austinburg, and Hinckley offices are equipped with DCO switches, which are early vintage digital switches. ALLTEL states that it would cost approximately $330,000 to upgrade each switch and that this upgrade would result in first generation hardware being used with current generation software, providing limited additional functionality other than equal access. Instead, ALLTEL proposes to replace the DCO switches in order to provide its customers with the latest generation in intelligent network services. ALLTEL seeks an additional three years and eight months, until November 15, 1994, for its Austinburg and Hinckley offices. ALLTEL seeks an additional four years and eight months, until November 15, 1995, for its Pleasant Hill office.

9. ALLTEL requests an additional one year and eight months, until November 15, 1992, to complete the conversion of its Rose City office. ALLTEL states that an extension will permit the equal access conversion to coincide with the completion of an upgrade program, and will increase the number of participants in the equal access offering.

10. ALLTEL states that its waiver request is in the public interest. According to ALLTEL, the additional time will eliminate expenditures for generic changes that will soon be obsolete, and permit the replacement of existing switches with state of the art technology. ALLTEL states that it will accelerate the equal access conversion process if possible, and adds that MCI does not object to the proposed completion dates.

11. Based on our review of the record, we conclude that the requested waivers are in the public interest. The petitioners have set forth circumstances justifying their requests, and no one has opposed these waiver requests.[5] In addition, MCI, the sole interexchange carrier requesting equal access, has agreed to the petitioners' proposed new completion dates for equal access conversion. We conclude that the companies have demonstrated that the timetables established by the Commission's rules are not feasible "except at costs that clearly outweigh potential benefits."[6]

12. Accordingly, IT IS ORDERED that the petition for waivers of the equal access implementation requirements are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[5] The United States Telephone Association filed comments supporting the waiver requests.
[6] *See ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-34

In the Matter of

Amendment of Part 90 of the
Rules to Permit the Short Spacing
of Specialized Mobile Radio Systems
Upon Concurrence from Co-Channel Users

ERRATUM

Released: November 15, 1991

On August 15, 1991, the Commission released a *Report and Order*, FCC 91-229, 6 FCC Rcd 4929 (1991), in this proceeding. This *Erratum* corrects typographical errors appearing in the Table in Section 90.621, and is effective immediately.

47 C.F.R. § 90.621 is amended by revising the first line in the Table in paragraph (b)(4) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

Distance (km) of Proposed Facility from Existing Facility[1 2]

		Proposed Facility*						
HAAT		ERP (watts)						
(m)	(feet)	1000	800	600	400	200	100	50
30.5	100	108	105	102	95	87	80	74

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Kenneth P. Moran
Chief, Accounting and Audits Division

In the Matter of

Capital Cities Cable, Inc.
Complainant,

v. File No. 85-0005

Southwestern Public
Service Company,
Respondent.

ORDER

Adopted: November 7, 1991; Released: November 15, 1991

By the Chief, Accounting and Audits Division:

1. On March 8, 1985, Capital Cities Cable, Inc. (since renamed as Post-Newsweek Cable, Inc.) filed the above-captioned complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a Commission determination that Southwestern Public Service Company (Southwestern) had imposed unjust and unreasonable rates for cable television pole attachments. The Commission ruled that Southwestern's rate was unjust and unreasonable by *Memorandum Opinion and Order,* Mimeo No. 5431, released June 28, 1985.

2. Southwestern responded to our determination by submitting a Petition for Reconsideration. We denied Southwestern's Petition by *Memorandum Opinion and Order,* Mimeo No. 6957, released September 13, 1985. Southwestern then submitted an Application for Review which, along with other pole attachment matters, was held in abeyance from October 21, 1985, until January 12, 1988.[1]

3. On August 12, 1991, counsel for both parties advised that there are no longer issues in controversy and requested dismissal of the pending complaint.

4. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

5. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154 (i), and authority delegated by Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the complaint filed by Capital Cities Cable, Inc. IS DISMISSED and this proceeding IS TERMINATED.

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[1] See Public Notice dated October 21, 1985, (Mimeo No. 0399) (holding all pole attachment complaints in abeyance pending further notice); Public Notice, 3 FCC Rcd 189 (1988) (announcing resumption of processing of pole attachment complaints).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3448
Revisions to Tariff F.C.C. No. 9

ORDER

Adopted: November 7, 1991; Released: November 7, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 10, 1991, AT&T Communications (AT&T) filed Transmittal No. 3448 to introduce a limited-time promotional offering for its ACCUNET T45 Service. The service provides for the transport of a maximum of 28 DS1 signals using T45 inter-office channels (IOCs), which are furnished on a two-point basis.[1] AT&T will offer a 37 percent discount off the monthly recurring rates for a six month period, and waive the associated access connection nonrecurring charges for customers ordering new IOCs to carry their traffic between California and Oregon. When the promotional period has expired, customers are charged the month-to-month rates that are in effect at that time. Transmittal 3448 specifies that customers must order the IOCs between November 9, 1991 and December 24, 1991, and request installation by December 31, 1991.

2. AT&T supplied illustrative adjustments to the adjusted price index (API) for Basket 3, and to the service band index (SBI) for the Other Private Line service category in accordance with Section 61.49(b) of the Commission's Rules, 47 C.F.R. § 61.49(b). The AT&T adjustments show that the new API falls below the price cap index for Basket 3, while the new SBI falls between the upper and lower limits.

3. MCI Communications Company (MCI) filed a petition to reject or, in the alternative, to suspend and investigate, the tariff. MCI contends that Transmittal 3448 is discriminatory. MCI Petition at 2. It argues that the "between-states" nature of the tariff is inconsistent with a previous decision requiring that ACCUNET T45 service be made available in a geographic area no smaller than a single state. MCI also maintains that the geographic limitation in the tariff shows that AT&T is targeting one customer. It asserts that AT&T cannot, therefore, claim that the discounts and waivers of charges are generally available. It adds that any contention by AT&T that the promotion is available to any customer needing service in California and Oregon should be weighed against the consideration that AT&T normally provides ACCUNET T45 offerings on an individual case basis. Finally, MCI argues, AT&T should apply a consistent range of pricing techniques to permit similarly-situated customers to be charged according to similar rate structures. *Id.* at 2-3.

4. AT&T responds that the "between-states" specificity of the promotion is not a "geographic restriction" on availability, and that it has previously offered promotions that were targeted to customers in specific states. AT&T Reply at 1-3. It counters that the language of the tariff shows that the promotion is available to any customer ordering a T45 IOC between California and Oregon. Moreover, AT&T maintains, MCI's own F.C.C. Tariff Nos. 1 and 5 provide private line service offerings that are limited to customers in specific geographic areas. *Id.* at 3-4.

5. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3448 and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject, or suspend and investigate, AT&T Communications Tariff F.C.C. No. 9, Transmittal No. 3448, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

[1] *See* AT&T F.C.C. Tariff No. 9, Section 12.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 2.106	RM-7771
of the Commission's Rules to	RM-7773
Allocate Spectrum to the	RM-7805
Mobile-Satellite Service for	RM-7806
Low-Earth Orbit Satellites	

ORDER EXTENDING TIME FOR REPLY COMMENTS

Adopted: October 24, 1991; Released: October 25, 1991

By the Office of Engineering and Technology:

1. On October 23, 1991, TRW Inc. (TRW) requested that the time for filing reply comments in the above-captioned proceeding be extended from October 31, 1991 to November 14, 1991.

2. In its request, TRW states that the comments filed in this proceeding involve highly technical matters which it will need to evaluate before it can offer useful comments to the Commission. TRW also states that some of the pleadings filed involved very complex allocations issues that can not be properly evaluated in the remaining 14 days of the reply comment period.

3. The Commission does not routinely grant extensions of time. However, we concur with TRW that in this instance an extension of time is warranted to permit all parties to fully analyze the comments on the complex technical matters that are at issue in this proceeding. Accordingly, IT IS ORDERED, that the deadline for filing reply comments in this proceeding IS EXTENDED to November 14, 1991.

4. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules, 47 C.F.R. Sections 0.31 and 0.241.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3320

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: November 7, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3320 to modify Virtual Telecommunications Network Service (VTNS) Option 3, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The revisions to Option 3: add the ability to provide 45 Mbps data transmission capabilities (DTCs); physically separate routing for ten 56 kbps DTCs; add the ability to place calls to specified international locations; increase the term of the Option from the current three years to five years; increase the minimum annual charge; provide a one-time reduction of $100,000 in the basic charge for the first full month of service within the four month period following January 1, 1992; introduce a domestic 1.5 Mbps DTC interruption credit; delete the installation charge and the Phase I installation incentive payments provision; and delete Type I authorization code calling capabilities. These revisions also restructure and reprice Rate Schedule F, which is used for Promotional Port Access Telephone Number (PPATN) calling; restructure and reprice the international usage volume pricing plans; restructure and reprice the domestic usage volume pricing plan; introduce a network prompter usage volume pricing plan; modify the discontinuance without liability provisions; and restructure and reprice the Change charges. In addition, this transmittal also makes conforming textual changes consistent with the above revisions in the provisions governing outage credit units, discontinuance with and without liability, switched access charges, the call rating matrix and the domestic VTC/DTC volume pricing plan. *See* AT&T Transmittal No. 3320 Description and Justification (D&J) at 2-15. The transmittal is scheduled to take effect on November 23, 1991.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or suspend and investigate modified Option 3, or to provide alternative relief on August 9, 1991.[1] AT&T filed a reply on August 22, 1991.

3. Williams argues that Transmittal 3320 features anticompetitive bundling of AT&T's 800 service with other services. Williams Petition at 2. Williams also insists that these revisions would increase the 800 service offerings in Option 3 and, by extending the term of Option 3, lock the customer into an "800 service bundling scheme" for the duration of the eighteen-month prohibition on such bundling. *Id.* at 5-7.

4. Williams further contends that modified Option 3 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[2] and must be reviewed in light of the remand. *Id.* at 7. Williams argues that AT&T has failed to demonstrate that modified Option 3 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *Id.* at 7-8. Williams asserts that even if Option 3 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 10.

5. AT&T replies that Williams' allegations that these revisions will expand the scope of 800 bundling are unfounded. AT&T Reply at 4. Specifically, AT&T alleges that Williams has mischaracterized Promotional Port Access Telephone Numbers and Promotional Port Access Telephone Number Caller Free Time as 800 services or 800 service features, when in fact, these services make no use of 800 numbers. *Id.*

6. AT&T further alleges that the remainder of Williams' claims have been raised without success in previous VTNS filings and insists that they are patently without merit. *Id.* at 5. AT&T also insists that the Court of Appeals decision in the *Tariff 12 Remand* creates no basis to reject or suspend new or revised VTNS offerings *Id.* at 7. Therefore, AT&T asserts that the most that the Commission should do is make the modifications to VTNS Option 3 subject to the outcome of the remand proceeding. *Id.*

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3320, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3320 filed by Williams Telecommunications Group, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 3320, filed by MCI Telecommunications Corporation, IS DISMISSED.

---

[1] We do not address in this Order a petition submitted by MCI Telecommunications Corporation (MCI) 14 days after the filing deadline. MCI incorrectly cites Section 1.45 of the Commission's Rules as its authority for the late filing. Section 1.773 of the Commission's Rules controls here, and pursuant to Section 1.773(a)(2)(ii), petitions to reject this transmittal should have been filed no later than August 12, 1991.

[2] *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g and remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

10. IT IS FURTHER ORDERED that, for the purpose of advancing the effective date of American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3320, Special Permission No. 91-945 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59, ARE WAIVED. These revisions should be filed to be effective on not less than one day's notice.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket Nos. 90-327, 91-116

In the Matter of

AT&T COMMUNICATIONS

Tariff F.C.C. No. 15

Competitive Pricing Plan Nos.
4, 5, 6, 8, 9, 10, 12, 13, 15,
16, 17, and 18

ORDER DESIGNATING ISSUE FOR INVESTIGATION

Adopted: October 31, 1991; Released: October 31, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Common Carrier Bureau (Bureau) has suspended, pending Commission investigation, twelve Competitive Pricing Plans (CPPs) filed by AT&T Communications (AT&T) under its Tariff F.C.C. No. 15.[1] Each of these Tariff 15 plans offers discounts on AT&T's tariffed rates to certain specific customers. In this Order, we designate the issue raised by the subject Tariff 15 CPPs and establish the schedule for filing pleadings on this issue.

II. BACKGROUND

2. Nine of the twelve CPPs at issue here provide eligible customers with percentage discounts on their monthly billings for particular services. These discounts range from 7 to 23 percent and each plan provides a single service or some combination of services such as Software Defined Network (SDN), World Connect, and 800 Service. The remaining three CPPs provide individual, named customers with either a one-time credit against the customer's initial Tariff 15 bill or a waiver of certain monthly recurring charges.

3. AT&T's tariff limits the availability of these discounts. Section 2.1.5.3 of Tariff 15 specifies that these plans "are designed to respond to special discounts offered to specific Customers by competing interexchange carriers." The tariff section also notes that in order for another customer to receive one of these discounts, a customer would have to "demonstrat[e] that [the customer has] received substantially similar offers from the competing interexchange carrier." *See* AT&T Tariff F.C.C. No. 15, Section 2.1.5.3.

III. DESIGNATED ISSUE

4. In an Order adopted on August 1, 1991, the Commission found AT&T's second Tariff 15 plan (CPP2), offered to Resort Condominiums, Inc. (RCI), to be unreasonably discriminatory in violation of Section 202(a) of the Communications Act.[2] In that Order, the Commission said:

> the effect of offering a discounted rate that is available only when (1) a competitor attempts to "underbid" with a similar offer the general rate otherwise applicable to a particular customer; (2) the customer discloses the terms of the competitor's offer to AT&T; and (3) AT&T's uniform response is to meet but not beat its competitor's price, is to undermine price competition in the interstate, interexchange communications services market.

Tariff 15 RCI Order at para. 14.

5. Each of the Tariff 15 plans at issue here appears to establish the same pricing mechanism, with the same anticompetitive impact, as that established by CPP2 and rejected by the Commission in the *Tariff 15 RCI Order*. Although each of these plans discounts different telecommunications services than those in CPP2, the Tariff 15 pricing mechanism, which each of these plans establishes, appears to be the same as that established by CPP2.

6. In order to resolve this issue, we direct AT&T to file a direct case addressing the following question:

> Can the pricing mechanism established by the above-captioned transmittals be distinguished from the offering that the Commission found unlawful in the *Tariff 15 RCI Order* and, if so, on what basis?

IV. PROCEDURAL MATTERS

7. Interested persons may file oppositions to, or comments on, AT&T's direct case pursuant to the procedures identified below. AT&T must file a direct case addressing this issue no later than November 12, 1991. Oppositions to AT&T's direct case should be filed by November 21, 1991. AT&T may file a rebuttal by November 29, 1991.

8. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial firm for copying, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

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[1] *See* the Appendix for citations to the Bureau Orders suspending these CPPs.

[2] AT&T Communications, Inc., Tariff F.C.C. No. 15, FCC No. 91-252, Mimeo 38222, released Sept. 16, 1991 (*Tariff 15 RCI Order*).

9. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

10. All relevant and timely comments and reply comments will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

11. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 3685 (Com. Car. Bur. 1990)(CPP4 - CBS, Inc.).

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 4581 (Com. Car. Bur. 1990)(CPP5 - La Quinta Motor Inns, Inc.).

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 4923 (Com. Car. Bur. 1990)(CPP6 - East Ohio Gas Company, Swift Global Communications, Inc. and Overseas Military Group).

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 5797(Com. Car. Bur. 1990)(CPP8 - Original Cookie, Inc.).

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 6336 (Com. Car. Bur. 1990)(CPP9 - Schwann Sales Enterprises, Inc.).

AT&T Communications, CC Docket No. 90-327, Memorandum Opinion and Order, 5 FCC Rcd 7000(Com. Car. Bur. 1990)(CPP10 - Deluxe Corporation).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 2307 (Com. Car. Bur. 1991)(CPP12 - State Street Bank, Inc.).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 2307 (Com. Car. Bur. 1991)(CPP13 - Kentucky Christian College).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 3994 (Com. Car. Bur. 1991)(CPP15 - Thomson Communications Services, Inc.).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 3739(Com. Car. Bur. 1991)(CPP16 - Siebe Inc.).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 5353 (Com. Car. Bur. 1991)(CPP17 - VoiceCom Systems, Inc.).

AT&T Communications, CC Docket No. 91-116, Memorandum Opinion and Order, 6 FCC Rcd 4450 (Com. Car. Bur. 1991)(CPP18 - Union Carbide Corp.).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-331

In the Matter of

People's Telephone
Company, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. People's Telephone Company, Inc. (PTC) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of PTC's informational tariff and further information that we have directed OSPs to file, we find that at least some of PTC's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, PTC must announce that its rates are available on request at the beginning of each call handled by PTC. Further, as we discuss below, PTC must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of PTC's informational tariff and its price out of sample telephone calls reveals that PTC's charges for these calls are as high as $7.85 for one eight-minute call. On the record before us, this rate does not appear to

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

be just and reasonable. We therefore direct PTC to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct PTC to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. PTC must complete the Statement of Costs and Revenues that is attached to this Order. In addition, PTC should present any other information that it believes demonstrates that its rates and charges are just and reasonable. PTC should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities PTC uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. PTC should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, PTC must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. PTC shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] PTC must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, PTC may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. PTC must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. PTC is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. PTC must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. PTC's submission shall be captioned "Justification of Operator Service Rates of People's Telephone Company, Inc." PTC shall include the docket number of this proceeding on the cover sheet to its Justification. PTC is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on PTC's submission not later than 25 days after PTC's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of People's Telephone Company, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on PTC. Finally, PTC may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of People's Telephone Company, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. PTC must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), People's Telephone Company, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that People's Telephone Company, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), People's Telephone Company, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				
Expenses					
1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	NET INCOME 8/				
Operating Statistics					
1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-332

In the Matter of

South Texas Phone, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. South Texas Phone, Inc. (STP) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of STP's informational tariff and further information that we have directed OSPs to file, we find that at least some of STP's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, STP must announce that its rates are available on request at the beginning of each call handled by STP. Further, as we discuss below, STP must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of STP's informational tariff and its price out of sample telephone calls reveals that STP's charges for these calls are as high as $7.95 for one eight-minute call. On the record before us, this rate does not appear to

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

be just and reasonable. We therefore direct STP to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct STP to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. STP must complete the Statement of Costs and Revenues that is attached to this Order. In addition, STP should present any other information that it believes demonstrates that its rates and charges are just and reasonable. STP should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities STP uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. STP should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, STP must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. STP shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] STP must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, STP may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. STP must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. STP is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. STP must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. STP's submission shall be captioned "Justification of Operator Service Rates of South Texas Phone, Inc." STP shall include the docket number of this proceeding on the cover sheet to its Justification. STP is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on STP's submission not later than 25 days after STP's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of South Texas Phone, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on STP. Finally, STP may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of South Texas Phone, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. STP must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), South Texas Phone, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that South Texas Phone, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), South Texas Phone, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				
Expenses					
1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	**NET INCOME 8/**				
Operating Statistics					
1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid In Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-333

In the Matter of

TelTrust, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. TelTrust, Inc. (TelTrust) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of TelTrust's informational tariff and further information that we have directed OSPs to file, we find that at least some of TelTrust's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, TelTrust must announce that its rates are available on request at the beginning of each call handled by TelTrust. Further, as we discuss below, TelTrust must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of TelTrust's informational tariff and its price out of sample telephone calls reveals that TelTrust's charges for these calls are as high as $7.81 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

TelTrust to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct TelTrust to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. TelTrust must complete the Statement of Costs and Revenues that is attached to this Order. In addition, TelTrust should present any other information that it believes demonstrates that its rates and charges are just and reasonable. TelTrust should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities TelTrust uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. TelTrust should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, TelTrust must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. TelTrust shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] TelTrust must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, TelTrust may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. TelTrust must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. TelTrust is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. TelTrust must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. TelTrust's submission shall be captioned "Justification of Operator Service Rates of TelTrust, Inc." TelTrust shall include the docket number of this proceeding on the cover sheet to its Justification. TelTrust is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on TelTrust's submission not later than 25 days after TelTrust's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of TelTrust, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on TelTrust. Finally, TelTrust may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of TelTrust, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. TelTrust must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), TelTrust, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that TelTrust, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), TelTrust, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				
Expenses					
1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	NET INCOME 8/				
Operating Statistics					
1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-334

In the Matter of

U.S. Fiberline Communications

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. U.S. Fiberline Communications (U.S. Fiberline) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of U.S. Fiberline's informational tariff and further information that we have directed OSPs to file, we find that at least some of U.S. Fiberline's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, U.S. Fiberline must announce that its rates are available on request at the beginning of each call handled by U.S. Fiberline. Further, as we discuss below, U.S. Fiberline must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of U.S. Fiberline's informational tariff and its price out of sample telephone calls reveals that U.S. Fiberline's charges for these calls are as high as $9.81 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct U.S. Fiberline to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct U.S. Fiberline to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. U.S. Fiberline must complete the Statement of Costs and Revenues that is attached to this Order. In addition, U.S. Fiberline should present any other information that it believes demonstrates that its rates and charges are just and reasonable. U.S. Fiberline should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities U.S. Fiberline uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. U.S. Fiberline should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, U.S. Fiberline must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. U.S. Fiberline shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5]

10. U.S. Fiberline must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, U.S. Fiberline may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

U.S. Fiberline must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. U.S. Fiberline is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. U.S. Fiberline must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. U.S. Fiberline's submission shall be captioned "Justification of Operator Service Rates of U.S. Fiberline Communications" U.S. Fiberline shall include the docket number of this proceeding on the cover sheet to its Justification. U.S. Fiberline is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on U.S. Fiberline's submission not later than 25 days after U.S. Fiberline's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of U.S. Fiberline Communications" Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on U.S. Fiberline. Finally, U.S. Fiberline may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of U.S. Fiberline Communications" and must in all other respects comply with the filing requirements described in the preceding paragraph. U.S. Fiberline must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), U.S. Fiberline Communications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that U.S. Fiberline Communications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), U.S. Fiberline Communications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

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[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:					
Current and Accrued Assets					
2010	Operating Assets				
2020	Other Current and Accrued Assets 3/				
2030	TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets					
2040	Property, Plant, & Equipment, Shared 10/				
2050	Property, Plant, & Equipment, Dedicated 11/				
2060	Accumulated Depreciation				
2070	Other Non-Current Assets 3/				
2080	TOTAL NON-CURRENT ASSETS 12/				
2090	**TOTAL ASSETS 13/**				
Liabilities and Equity:					
Current and Accrued Liabilities					
2100	Accounts Payable				
2110	Notes Payable (current portion)				
2120	Accrued Taxes				
2130	Other Current and Accrued Liabilities 3/				
2140	TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt					
2150	TOTAL LONG-TERM DEBT				
Deferred Credits					
2160	Accumulated Deferred Income Tax & Credits				
2170	Other 3/				
2180	TOTAL DEFERRED CREDITS 15/				
Equity					
2190	Capital Stock				
2200	Additional Paid in Capital				
2210	Other Capital 3/				
2220	TOTAL EQUITY ACCOUNTS 16/				
2230	**TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-335

In the Matter of

U.S. Long Distance, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. U.S. Long Distance, Inc. (USLD) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of USLD's informational tariff and further information that we have directed OSPs to file, we find that at least some of USLD's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, USLD must announce that its rates are available on request at the beginning of each call handled by USLD. Further, as we discuss below, USLD must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of USLD's informational tariff and its price out of sample telephone calls reveals that USLD's charges for these calls are as high as $7.54 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

USLD to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct USLD to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. USLD must complete the Statement of Costs and Revenues that is attached to this Order. In addition, USLD should present any other information that it believes demonstrates that its rates and charges are just and reasonable. USLD should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities USLD uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. USLD should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, USLD must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. USLD shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] USLD must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, USLD may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. USLD must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. USLD is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. USLD must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. USLD's submission shall be captioned "Justification of Operator Service Rates of U.S. Long Distance, Inc." USLD shall include the docket number of this proceeding on the cover sheet to its Justification. USLD is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on USLD's submission not later than 25 days after USLD's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of U.S. Long Distance, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on USLD. Finally, USLD may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of U.S. Long Distance, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. USLD must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), U.S. Long Distance, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that U.S. Long Distance, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), U.S. Long Distance, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other – Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal Nos. 2126 and 2147

Tariff F.C.C. No. 68

ORDER

Adopted: November 4, 1991; Released: November 6, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2126 to establish a new section for Coin Services in its Tariff F.C.C. No. 68 and to modify the current language in that tariff to make it consistent with the Equal Access Compliance Plan SWB filed with the Department of Justice on November 7, 1990. As originally filed, Transmittal 2126 provided that if SWB did not receive 1+ message call detail from an interexchange carrier (IXC) within 30 days of the call message date, SWB would keep, without recourse, the coin box revenues for that call. Transmittal 2126 at Section 23.5(B); Description and Justification (D&J) at Section 3.1.

2. AT&T filed a petition to reject, or alternatively, suspend and investigate Transmittal 2126 on August 26, 1991. In that petition, AT&T's sole argument is that the forfeiture provision in Transmittal 2126 is patently unlawful, unjust, and unreasonable, and therefore in violation of Section 201(b) of the Communications Act.

3. Southwestern Bell defended the provision in its reply, but then filed revisions that removed the language in Transmittal 2126 stating that SWB would retain revenues collected for sent-paid calls if call message detail was not submitted by its billing date. SWB Tariff F.C.C. No. 68, Transmittal No. 2147, filed Nov. 4, 1991.

4. The Common Carrier Bureau has reviewed SWB Transmittal No. 2126, as modified by Transmittal No. 2147, AT&T's petition, and SWB's reply. We conclude that in view of the revisions filed by SWB in Transmittal 2147 no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, or alternatively, suspend and investigate Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 2126 filed by the American Telephone and Telegraph Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T	Transmittal Nos.
COMMUNICATIONS	3464, 3465, 3532

Revisions to Tariff F.C.C. No. 9

ORDER

Adopted: November 5, 1991; Released: November 7, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

1. On September 17, 1991, AT&T Communications (AT&T) filed Transmittal No. 3464 to its Tariff F.C.C. No. 9 to increase the monthly rates for Accunet T1.5 Services, Accunet Spectrum of Digital Services (ASDS)(9.6 kbps and 56/64 kbps), and Voice Grade Private Line (VGPL) interoffice channels (IOC) of 100 miles and less. AT&T would also generally increase ASDS (128 kbps, 256 kbps, 384 kbps, 512 kbps and 768 kbps) of 50 miles and less. In addition, Transmittal 3464 reduces rates for ASDS (128 kbps, 256 kbps, 384 kbps, 512 kbps and 768 kbps) IOCs of 51 miles and above and T1.5 IOCs of 101 miles and above. Finally, Transmittal 3464 increases the monthly rates for T1.5 M-24 and M-44 multiplexing functions and access connection and T1.5, ASDS, and VGPL transfer arrangements. On September 17, AT&T also filed Transmittal No. 3465, which increases the monthly analog multipoint charge for ASDS and VGPL Services. These tariffs are scheduled to become effective on November 9, 1991.

2. On October 9, 1991, AT&T filed other revisions to its private line rates to offset the Basket 3 increases in Transmittals 3464 and 3465. Under Transmittal No. 3532, which became effective October 23, 1991, AT&T reduced monthly rates for the following AT&T private line service offerings: (1) Terrestrial Television Services Interoffice Channels furnished to Educational Television; (2) Special Government Services Selective Channel Arrangements; (3) Common Control Switching Arrangements (CCSA) voice grade ports and various arrangements; and (4) Switched Circuit Automatic Network (SCAN) voice grade ports and various arrangements. No petitions were filed against this tariff.

3. On September 24, 1991, the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a petition to partially suspend and investigate Transmittals 3464 and 3465, while the Aeronautical Radio, Inc. (Arinc) filed a petition to reject, or in the alternative, to suspend and investigate the transmittals.[1] Ad Hoc argues that AT&T is attempting to circumvent the Commission's *Interexchange Competition Order* by substantially increasing analog rates before the rates become subject to the price cap requirements imposed by the Order. Ad H oc Petition at 4. [2] Ad Hoc contends that AT&T's analog rate revisions will cause Price Cap Basket 3, in which analog services are placed, to be above cap when the *Interexchange Competition Order* becomes effective. *Id.* Ad Hoc protests that AT&T will then be compelled to offset the increases, causing disruptive and unnecessary rate churn for analog VGPL users. *Id.* at 5-7.

4. Arinc also asserts that the interoffice channel and analog multipoint rate revisions will cause Basket 3 to be above-cap when the *Interexchange Competition Order* becomes effective. Accordingly, Arinc contends that AT&T did not file the cost support necessary to justify such an above-cap rate increase. Arinc Petition at 5-7. Arinc further argues that AT&T's analog revisions undermine the policy the Commission asserted in the *Interexchange Competition Order* to protect analog private line ratepayers against rate shock whenever no competitive alternative analog service is available. *Id.* at 8.

5. On October 3, 1991, AT&T replied to the petitions. AT&T asserts that the rate revisions in Transmittals 3464 and 3465 are currently below-cap and within band. Thus, AT&T claims, the analog rates are streamlined price cap filings which should not be measured against the *Interexchange Competition Order*, which is not yet in effect. AT&T Reply at 5. AT&T further argues that it is not required to file extensive cost support for these below-cap, within band revisions. *Id* at 4.

6. The Common Carrier Bureau has reviewed the above-referenced transmittals and the related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions regarding AT&T Communications Tariff F.C.C. No. 9, Transmittal Nos. 3464 and 3465, filed by the Ad Hoc Telecommunications Users Committee and the Aeronautical Radio, Inc., ARE DENIED.

8. IT IS FURTHER ORDERED that the motion for leave to file a late pleading, filed by the American Petroleum Institute, IS DENIED.

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[1] On September 25, 1991, the American Petroleum Institute (API) filed a petition to reject, or in the alternative, to suspend and investigate Transmittal 3465. API filed its petition one day late and accompanied it with a motion for leave to file a late pleading. API asserts that it was unable to respond to AT&T on time because review of the tariff transmittal and consideration by the API Telecommunications Committee members took longer than the seven days allotted for its response.. API Motion at 1. We conclude that API failed to demonstrate good cause for its late filing. Accordingly, we deny API's motion for leave to file its petition to suspend and investigate Transmittal 3465.

[2] *Citing* Competition in the Interexchange Marketplace, CC Docket No. 90-132, FCC 91-251, _____ FCC Rcd _____ (released September 16, 1991) (*Interexchange Competition Order).*

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-313

In the Matter of

Policy and Rules Concerning
Rates for Dominant Carriers

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1991; Released: November 7, 1991

By the Chief, Common Carrier Bureau:

1. On May 17, 1991, the Bureau released our Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established a filing date of August 19, 1991, for price cap LECs' first automated quarterly service quality and annual infrastructure reports,[3] and a September 30, 1991, filing date for the second quarterly service quality report as well as the annual infrastructure report covering calendar year 1989.[4] On September 20, 1991, US West Communications, Inc. (US West) filed a petition for waiver of some of the filing requirements for the September 30, 1991 and March 31, 1992 semi-annual service quality reports. In this Order we grant that petition in part.

2. US West states that it is unable to provide lines 243 and 244 (gain slope and C-notch noise data on trunk basis), and 253 and 254 (gain slope and C-notch noise data on central office basis) for five of its study areas which were formerly served by Northwestern Bell, which did not measure, or provide for the measurement of, these indicators.[5] US West states that it is presently in the process of implementing systems that will allow such measurement, but indicates that this process means that US West will be unable to provide these measurements for these study areas before the September 1992 filing date. US West states that the lateness of its waiver request is due to miscommunication and a lack of awareness of this problem on the part of US West personnel responsible for preparing these reports.

3. The transmission quality standards required in the Bureau's *Service Quality Order* were taken directly from semi-annual report requirements imposed on the BOCs since divestiture by the Bureau's Industry Analysis Division. As BOCs, the various companies making up US West, pre- and post-consolidation, are and were subject to these reporting requirements. Further, this Bureau has been very clear in its insistence on complete and accurate reporting under the service quality guidelines established in the May 1991 *Service Quality Order*.[6] Thus, we are struck by the lateness of US West's request for waiver; it was submitted a mere 10 days prior to a filing date established over four months ago, which date was discussed in industry meetings six months before that. Nonetheless, we reluctantly grant US West's limited waiver request, insofar as it applies to the September 30 filing, since our failure to do so would apparently impose an impossibility. With regard to the March 31 filing, US West is directed to file the full data transmission report.

4. Accordingly, IT IS ORDERED that the request for waiver filed by US West Communications, Inc. in the above-captioned proceeding on September 20, 1991, IS GRANTED to the extent discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[3] On July 1, 1991, the price cap LECs filed the first quarterly service quality and annual infrastructure reports in hard copy only. This filing was reviewed by Bureau staff, and prompted the Bureau's Memorandum Opinion and Order of August 2, 1991, directing LECs to bring their filings into conformance with the Bureau's instructions or, if that is not possible, apply for waivers. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-963, released Aug. 2, 1991 (*August 2 Order*).

[4] The infrastructure reporting requirements were derived by the Commission from a set of filing requirements originally established in CC Docket No. 89-624, the rate of return represcription proceeding. In that docket, the Bell Operating Companies (BOCs) and GTE Telephone Operating Companies (GTOC) filed historical infrastructure data for each year from 1980 on, and projected data for each year until 1994. The infrastructure reporting requirements for price cap LECs are very similar to those. The Commission decided that, in the interest of maintaining continuity in these data, price cap LECs should file historical infrastructure data to cover calender year 1989 (which was included in the Docket 89-624 data in projection, and would otherwise be excluded from historical data since it precedes these LECs' entry into price cap regulation).

[5] US West notes that the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company consolidated, under grant of Commission authority, in March 1990.

[6] *See, e.g.*, Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order, DA 91-963, released Aug. 2, 1991, at para. 7 (which discusses waiver requests and compliance with filing requirements).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-324

In the Matter of

Advanced Technology Cellular
Telecommunications

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Advanced Technology Cellular Telecommunications (ATCT) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of ATCT's informational tariff and further information that we have directed OSPs to file, we find that at least some of ATCT's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, ATCT must announce that its rates are available on request at the beginning of each call handled by ATCT. Further, as we discuss below, ATCT must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of ATCT's informational tariff and its price out of sample telephone calls reveals that ATCT's charges for these calls are as high as $7.97 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct

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[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

ATCT to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.*[4]

8. Consistent with the explicit instructions of the Congress, we direct ATCT to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. ATCT must complete the Statement of Costs and Revenues that is attached to this Order. In addition, ATCT should present any other information that it believes demonstrates that its rates and charges are just and reasonable. ATCT should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities ATCT uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. ATCT should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, ATCT must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. ATCT shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] ATCT must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, ATCT may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. ATCT must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. ATCT is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. ATCT must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. ATCT's submission shall be captioned "Justification of Operator Service Rates of Advanced Technology Cellular Telecommunications." ATCT shall include the docket number of this proceeding on the cover sheet to its Justification. ATCT is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on ATCT's submission not later than 25 days after ATCT's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Advanced Technology Cellular Telecommunications." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on ATCT. Finally, ATCT may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Advanced Technology Cellular Telecommunications" and must in all other respects comply with the filing requirements described in the preceding paragraph. ATCT must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Advanced Technology Cellular Telecommunications SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Advanced Technology Cellular Telecommunications SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Advanced Technology Cellular Telecommunications SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other – Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-325

In the Matter of

Cherokee Communications, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Cherokee Communications, Inc. (Cherokee) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Cherokee's informational tariff and further information that we have directed OSPs to file, we find that at least some of Cherokee's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, Cherokee must announce that its rates are available on request at the beginning of each call handled by Cherokee. Further, as we discuss below, Cherokee must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports.[2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992.[3]

III. DISCUSSION

6. Our review of Cherokee's informational tariff and its price out of sample telephone calls reveals that Cherokee's charges for these calls are as high as $9.12 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Cherokee to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H. R. Rep. No. 213,101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [4]

8. Consistent with the explicit instructions of the Congress, we direct Cherokee to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Cherokee must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Cherokee should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Cherokee should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Cherokee uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Cherokee should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Cherokee must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Cherokee shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991.[5] Cherokee must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Cherokee may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Cherokee must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Cherokee is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Cherokee must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Cherokee's submission shall be captioned "Justification of Operator Service Rates of Cherokee Communications, Inc." Cherokee shall include the docket number of this proceeding on the cover sheet to its Justification. Cherokee is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Cherokee's submission not later than 25 days after Cherokee's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Cherokee Communications, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Cherokee. Finally, Cherokee may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Cherokee Communications, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. Cherokee must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Cherokee Communications, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Cherokee Communications, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Cherokee Communications, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

---

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				
Expenses					
1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	**NET INCOME 8/**				
Operating Statistics					
1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-326

In the Matter of

Capital Network Systems, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Capital Network Systems, Inc. (CNS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of CNS's informational tariff and further information that we have directed OSPs to file, we find that at least some of CNS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, CNS must announce that its rates are available on request at the beginning of each call handled by CNS. Further, as we discuss below, CNS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. [3]

III. DISCUSSION

6. Our review of CNS's informational tariff and its price out of sample telephone calls reveals that CNS's charges for these calls are as high as $7.64 for one eight-minute call. On the record before us, this rate does not

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[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

appear to be just and reasonable. We therefore direct CNS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [4]

8. Consistent with the explicit instructions of the Congress, we direct CNS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. CNS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, CNS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. CNS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities CNS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. CNS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, CNS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. CNS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [5] CNS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, CNS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. CNS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. CNS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. CNS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. CNS's submission shall be captioned "Justification of Operator Service Rates of Capital Network Systems, Inc." CNS shall include the docket number of this proceeding on the cover sheet to its Justification. CNS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on CNS's submission not later than 25 days after CNS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Capital Network Systems, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on CNS. Finally, CNS may respond any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Capital Network Systems, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. CNS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Capital Network Systems, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Capital Network Systems, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Capital Network Systems, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/		Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income					
1010	Operating Revenues				
1020	Uncollectible Revenues				
1030	Non-Operating Income 3/				
1040	Other 3/				
1050	TOTAL REVENUES AND INCOME 4/				
Expenses					
1060	Salaries & Wages, Owners & Officers of Company				
1070	Salaries & Wages, Relatives of Owners & Officers				
1080	Salaries & Wages, Others				
1090	Health and Life Insurance				
1100	General Insurance				
1110	Miscellaneous Operating Expenses 3/				
1120	Taxes				
1130	Access Expense				
1140	Depreciation				
1150	Interest on Short-Term Debt 5/				
1160	Interest on Long-Term Debt 6/				
1170	Other Operating Expenses 3/				
1180	Other Expense 3/				
1190	TOTAL EXPENSES 7/				
1200	NET INCOME 8/				
Operating Statistics					
1210	Number of Full-Time Employees				
1220	Number of Part-Time Employees				
1230	Number of Workhours, Full-Time Employees				
1240	Number of Workhours, Part-Time Employees				
1250	Number of Operator Calls Handled				
1260	Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 TOTAL ASSETS 13/				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid In Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 TOTAL LIABILITIES AND EQUITY 17/				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-327

In the Matter of

Conquest Telecommunications, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Conquest Telecommunications, Inc. (Conquest) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of Conquest's informational tariff and further information that we have directed OSPs to file, we find that at least some of Conquest's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, Conquest must announce that its rates are available on request at the beginning of each call handled by Conquest. Further, as we discuss below, Conquest must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. [3]

III. DISCUSSION

6. Our review of Conquest's informational tariff and its price out of sample telephone calls reveals that Conquest's charges for these calls are as high as $8.71 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct Conquest to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

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[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H. R. Rep. No. 213,101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [4]

8. Consistent with the explicit instructions of the Congress, we direct Conquest to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. Conquest must complete the Statement of Costs and Revenues that is attached to this Order. In addition, Conquest should present any other information that it believes demonstrates that its rates and charges are just and reasonable. Conquest should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities Conquest uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. Conquest should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, Conquest must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. Conquest shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [5] Conquest must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, Conquest may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. Conquest must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. Conquest is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. Conquest must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. Conquest's submission shall be captioned "Justification of Operator Service Rates of Conquest Telecommunications, Inc." Conquest shall include the docket number of this proceeding on the cover sheet to its Justification. Conquest is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on Conquest's submission not later than 25 days after Conquest's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Conquest Telecommunications, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on Conquest. Finally, Conquest may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Conquest Telecommunications, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. Conquest must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Conquest Telecommunications, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Conquest Telecommunications, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Conquest Telecommunications, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

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[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 **TOTAL ASSETS 13/**				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-328

In the Matter of

CPS Operator Services, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. CPS Operator Services, Inc. (CPS) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of CPS's informational tariff and further information that we have directed OSPs to file, we find that at least some of CPS's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, CPS must announce that its rates are available on request at the beginning of each call handled by CPS. Further, as we discuss below, CPS must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. [3]

III. DISCUSSION

6. Our review of CPS's informational tariff and its price out of sample telephone calls reveals that CPS's charges for these calls are as high as $10.25 for one eight-minute call. [4] On the record before us, this rate does not appear

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[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

[4] CPS reports that it would charge a total of $10.25 for four of the ten sample calls: an eight-minute 0+ Collect call in the 1910 mile band placed from a hotel in the evening and an eight-minute 0+ Collect call in the 1910 mile band placed from a public pay telephone in the day, evening, or night/weekend periods.

to be just and reasonable. We therefore direct CPS to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [5]

8. Consistent with the explicit instructions of the Congress, we direct CPS to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. CPS must complete the Statement of Costs and Revenues that is attached to this Order. In addition, CPS should present any other information that it believes demonstrates that its rates and charges are just and reasonable. CPS should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities CPS uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. CPS should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, CPS must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. CPS shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [6] CPS must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, CPS may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. CPS must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. CPS is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. CPS must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. CPS's submission shall be captioned "Justification of Operator Service Rates of CPS Operator Services, Inc." CPS shall include the docket number of this proceeding on the cover sheet to its Justification. CPS is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on CPS's submission not later than 25 days after CPS's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of CPS Operator Services, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on CPS. Finally, CPS may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of CPS Operator Services, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. CPS must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), CPS Operator Services, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that CPS Operator Services, Inc. SHALL FILE the attached Statement of Costs and Revenues together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), CPS Operator Services, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

---

[5] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[6] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 **TOTAL ASSETS 13/**				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-329

In the Matter of

Com Systems, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. Com Systems, Inc. (CSI) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of CSI's informational tariff and further information that we have directed OSPs to file, we find that at least some of CSI's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, CSI must announce that its rates are available on request at the beginning of each call handled by CSI. Further, as we discuss below, CSI must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. [3]

III. DISCUSSION

6. Our review of CSI's informational tariff and its price out of sample telephone calls reveals that CSI's charges for these calls are as high as $8.09 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct CSI to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

---

[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [4]

8. Consistent with the explicit instructions of the Congress, we direct CSI to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. CSI must complete the Statement of Costs and Revenues that is attached to this Order. In addition, CSI should present any other information that it believes demonstrates that its rates and charges are just and reasonable. CSI should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities CSI uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. CSI should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, CSI must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. CSI shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [5] CSI must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, CSI may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. CSI must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. CSI is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. CSI must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. CSI's submission shall be captioned "Justification of Operator Service Rates of Com Systems, Inc." CSI shall include the docket number of this proceeding on the cover sheet to its Justification. CSI is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on CSI's submission not later than 25 days after CSI's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of Com Systems, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on CSI. Finally, CSI may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of Com Systems, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. CSI must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), Com Systems, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that Com Systems, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), Com Systems, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non-Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short-Term Debt 5/				
1160 Interest on Long-Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full-Time Employees				
1220 Number of Part-Time Employees				
1230 Number of Workhours, Full-Time Employees				
1240 Number of Workhours, Part-Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 **TOTAL ASSETS 13/**				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-330

In the Matter of

International Pacific, Inc.

ORDER

Adopted: November 4, 1991; Released: November 8, 1991

By the Deputy Chief (Policy), Common Carrier Bureau:

I. INTRODUCTION

1. The Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. §226(a) *et seq.*, requires, *inter alia*, that interstate providers of operator services (OSPs) file informational tariffs

> specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(a). TOCSIA also provides that if, upon review by the Commission, the rates and charges filed by any OSP appear to be unjust and unreasonable, the Commission may require such OSP to do either or both of the following:

> (A) demonstrate that its rates and charges are just and reasonable, and
>
> (B) announce that its rates are available on request at the beginning of each call.

47 U.S.C. § 226(h)(2).

2. International Pacific, Inc. (IPI) is one of 396 OSPs that have filed informational tariffs with the Commission since the informational tariff filing requirement became effective on January 15, 1991. Based on our review of IPI's informational tariff and further information that we have directed OSPs to file, we find that at least some of IPI's rates and charges appear to be unjust and unreasonable. Therefore, pursuant to Section 226(h)(2)(B) of the Communications Act, 47 U.S.C. § 226(h)(2)(B), effective ten days from the release of this Order, IPI must announce that its rates are available on request at the beginning of each call handled by IPI. Further, as we discuss below, IPI must demonstrate, pursuant to Section 226(h)(2)(A) of the Act, 47 U.S.C. § 226(h)(2)(A), that its rates are just and reasonable.

II. BACKGROUND

3. TOCSIA was enacted in October 1990 to achieve two main purposes. First, the legislation seeks to protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls. TOCSIA also seeks to ensure that consumers have the opportunity to make informed choices in making such calls. 47 U.S.C. § 226(d)(1). TOCSIA therefore imposes various information disclosure and operating requirements on OSPs and call aggregators and charges the Commission with the responsibility of monitoring and regulating the activities of OSPs and aggregators.

4. In discharging its duties under TOCSIA, the Commission has initiated several proceedings. In Phase II of CC Docket No. 90-313 we have directed OSPs to file periodic reports detailing their rates, complaints concerning their service, and the costs that they incur in providing service to the public. These reports serve principally to assist the Commission in fulfilling monitoring and reporting responsibilities under Section 226(h)(3) of the Act, 47 U.S.C. § 226(h)(3). In addition, however, these reports provide valuable data for our review of the informational tariffs.

5. The report of sample charges that we have directed OSPs to file is particularly illuminating in our review of the informational tariffs. In this section of its report the OSP must list the charges it would assess for 20 calls that are typical of operator assisted calls handled by American Telephone and Telegraph Company (AT&T).[1] We directed OSPs to file this information with each of four reports. [2] The *OSP Reporting Requirements Order* required OSPs to submit their reports on June 21, 1991, September 23, 1991, March 23, 1992, and September 21, 1992. [3]

III. DISCUSSION

6. Our review of IPI's informational tariff and its price out of sample telephone calls reveals that IPI's charges for these calls are as high as $7.70 for one eight-minute call. On the record before us, this rate does not appear to be just and reasonable. We therefore direct IPI to demonstrate that this rate is, in fact, just and reasonable or reduce its rates to a just and reasonable level.

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[1] The call data that AT&T originally submitted includes four calls placed from hotels and six calls placed from public pay telephones. The duration of each call is eight minutes and the calls vary by time of day and call type (*i.e.*, whether placed collect or using a calling card). Each of the ten calls is priced at 56 miles and at 1910 miles. Each OSP's price out of these calls thus produces 20 sample call charges.

[2] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, 6 FCC Rcd 2314 (Com. Car. Bur. 1991) (*OSP Reporting Requirements Order*).

[3] Due to poor compliance with the requirement to file the first report, the Common Carrier Bureau issued a public notice on August 14, 1991 reiterating and clarifying the instructions contained in the *OSP Reporting Requirements Order*. *See* Public Notice, Commission Clarifies Requirements for Reports To Be Filed by Operator Service Providers, DA 91-1005, released Aug. 14, 1991. Approximately 225 OSPs filed reports on September 23, 1991.

7. Neither TOCSIA nor the Commission's Rules establish what shall be a just and reasonable rate for an operator-assisted call. The House Committee Report on the bill that eventually became TOCSIA noted that the Commission would have the authority to require OSPs to demonstrate that their rates and charges are just and reasonable "by providing convincing evidence that they reflect the reasonable costs of providing the service plus a reasonable profit." H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989). Although the report eschewed "traditional rate-based, rate of return regulation" it noted that OSPs "must demonstrate that [their] rates and charges reflect their reasonable costs of providing service plus a reasonable profit." *Id.* [4]

8. Consistent with the explicit instructions of the Congress, we direct IPI to demonstrate that its rates and charges reflect its reasonable costs of providing service plus a reasonable profit. IPI must complete the Statement of Costs and Revenues that is attached to this Order. In addition, IPI should present any other information that it believes demonstrates that its rates and charges are just and reasonable. IPI should provide detailed information explaining its costs of providing operator services. Such information should include, but need not be limited to, investment and expenses associated with facilities IPI uses in the provision of operator services, commissions and surcharges it pays to aggregators, charges it pays for billing and validation services, and expenses for salaries and other employee benefits. IPI should also detail any other investment or expense it believes justifies the rates it is charging for operator services.

9. Similarly, IPI must file information concerning its revenues from the provision of operator services and must state the level of profits generated by these operations. IPI shall calculate the annualized rate of return that it has realized on all investment, used and useful, in the provision of interstate operator services for the period from January 1, 1991, through June 30, 1991. [5] IPI must explain the method by which it identifies relevant investment and calculates its rate of return on investment. Finally, IPI may include any other information that it believes demonstrates that its cost of providing operator services and the profit that it realizes from these services are just and reasonable.

10. IPI must certify the accuracy of all data submitted in support of its rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of the rates, including all data that is included in the Statement of Costs and Revenues. The text of the certification is displayed in Attachment A.

IV. FILING REQUIREMENTS

11. IPI is directed to complete and file the attached Statement of Costs and Revenues not later than 45 days after release of this Order. IPI must also file any other information it believes demonstrates that the rates it charges for the provision of interstate operator services are just and reasonable by such date. IPI's submission shall be captioned "Justification of Operator Service Rates of International Pacific, Inc." IPI shall include the docket number of this proceeding on the cover sheet to its Justification. IPI is directed to file an original and four copies of all materials that it submits in this proceeding to the Secretary, Federal Communications Commission, 1919 M St., NW, Washington, D.C. 20554.

12. Interested parties may file comments on IPI's submission not later than 25 days after IPI's filing. These filings shall be captioned "Comments on Justification of Operator Service Rates of International Pacific, Inc." Commenters shall include the docket number of this proceeding on the cover sheet to their comments and shall file an original and four copies of all submissions with the Secretary of the Commission. Commenters must also serve their comments on IPI. Finally, IPI may respond to any comments filed with respect to its justification. This filing shall be captioned "Reply Comments of International Pacific, Inc." and must in all other respects comply with the filing requirements described in the preceding paragraph. IPI must file its reply comments, if it chooses to respond to any comments that may be filed, not later than 15 days after comments are filed.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, that, pursuant to Section 226(h)(2)(A), 47 U.S.C. § 226(h)(2)(A), International Pacific, Inc. SHALL DEMONSTRATE that its rates and charges for the provision of interstate operator services are just and reasonable.

14. IT IS FURTHER ORDERED, that International Pacific, Inc. SHALL FILE the attached Statement of Costs and Revenues, together with any other material upon which it intends to rely in demonstrating that its rates and charges are just and reasonable, in accordance with the schedule established in this Order.

15. IT IS FURTHER ORDERED, that, pursuant to Section 226(h)(2)(B), 47 U.S.C. § 226(h)(2)(B), International Pacific, Inc. SHALL ANNOUNCE at the beginning of each call that its rates are available on request.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

[4] The bill reported by the Senate Committee on Commerce, Science, and Transportation differed from the House bill in a number of respects. In particular, the Senate bill would have omitted the provision authorizing the Commission to require OSPs to demonstrate that their rates are just and reasonable. The language ultimately adopted, however, is consistent with the provision reported by the House Committee on Energy and Commerce.

[5] We have selected a six-month rate of return monitoring period as the period for which data is most likely to be available. Although OSPs were not required to file informational tariffs until January 15, 1991, we nevertheless believe that the required data should be available for the period specified.

ATTACHMENT A

CERTIFICATION

I am [insert officer title]. I hereby certify that I have overall responsibility for the preparation of all data supporting the [insert name of company] operator service rates, and that I am authorized to execute this certification. Based upon my personal knowledge, or based upon information provided to me by employees responsible for the preparation of, or for supervision of the preparation of, the data submitted herewith, I hereby certify that the data have been examined and reviewed and are true, correct, and complete.

Name: _____

Title: _____

Date: _____

Persons making willful false statements in this report form are subject to punishment by fine or imprisonment under the provisions of the United States Code, Title 18, Section 1001.

Statement of Income and Operations

Company: _____

Period: January 1, 1990 through December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Revenues and Income				
1010 Operating Revenues				
1020 Uncollectible Revenues				
1030 Non–Operating Income 3/				
1040 Other 3/				
1050 TOTAL REVENUES AND INCOME 4/				
Expenses				
1060 Salaries & Wages, Owners & Officers of Company				
1070 Salaries & Wages, Relatives of Owners & Officers				
1080 Salaries & Wages, Others				
1090 Health and Life Insurance				
1100 General Insurance				
1110 Miscellaneous Operating Expenses 3/				
1120 Taxes				
1130 Access Expense				
1140 Depreciation				
1150 Interest on Short–Term Debt 5/				
1160 Interest on Long–Term Debt 6/				
1170 Other Operating Expenses 3/				
1180 Other Expense 3/				
1190 TOTAL EXPENSES 7/				
1200 NET INCOME 8/				
Operating Statistics				
1210 Number of Full–Time Employees				
1220 Number of Part–Time Employees				
1230 Number of Workhours, Full–Time Employees				
1240 Number of Workhours, Part–Time Employees				
1250 Number of Operator Calls Handled				
1260 Number of Months in Operation During 1990				

Statement of Investment

Company: _____

Period: On December 31, 1990

Line # and Account 1/	Operator Service	Other Telephone Related	Other	Total Company 2/
Assets:				
Current and Accrued Assets				
2010 Operating Assets				
2020 Other Current and Accrued Assets 3/				
2030 TOTAL CURRENT AND ACCRUED ASSETS 9/				
Non-Current Assets				
2040 Property, Plant, & Equipment, Shared 10/				
2050 Property, Plant, & Equipment, Dedicated 11/				
2060 Accumulated Depreciation				
2070 Other Non-Current Assets 3/				
2080 TOTAL NON-CURRENT ASSETS 12/				
2090 **TOTAL ASSETS 13/**				
Liabilities and Equity:				
Current and Accrued Liabilities				
2100 Accounts Payable				
2110 Notes Payable (current portion)				
2120 Accrued Taxes				
2130 Other Current and Accrued Liabilities 3/				
2140 TOTAL CURRENT AND ACCRUED LIABILITIES 14/				
Total Long-Term Debt				
2150 TOTAL LONG-TERM DEBT				
Deferred Credits				
2160 Accumulated Deferred Income Tax & Credits				
2170 Other 3/				
2180 TOTAL DEFERRED CREDITS 15/				
Equity				
2190 Capital Stock				
2200 Additional Paid in Capital				
2210 Other Capital 3/				
2220 TOTAL EQUITY ACCOUNTS 16/				
2230 **TOTAL LIABILITIES AND EQUITY 17/**				

Footnotes

1/ The information supplied should conform to conventional accounting definition. With respect to accounts related to telephone service, Part 32 of the FCC rules (USOA), 47 CFR, Section 32, should be consulted.
2/ Total Company equals the sum of Operator Service, Other–Telephone Related, and Other categories.
3/ Attach explanatory note regarding items in account.
4/ Equals the sum of lines 1010 through 1040.
5/ Interest on the debt to be repaid in 1 year or less.
6/ Interest on the debt to be repaid over more than 1 year.
7/ Equals the sum of lines 1060 through 1180.
8/ Equals Lines 1050 minus 1190.
9/ Equals Lines 2010 through 2020.
10/ Dedicated exclusively to Operator Service operations.
11/ Shared in operations other than operator service.
12/ Equals Lines 2040 through 2070.
13/ Equals Lines 2030 plus 2080.
14/ Equals Lines 2100 through 2130.
15/ Equals Lines 2160 through 2170.
16/ Equals Lines 2190 through 2210.
17/ Equals Lines 2140 + 2150 +2180 + 2220.

Before the
Federal Communications Commission
Washington, D.C. 20554

FO Docket 91-301

In the Matter of

Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System — RM-7188

NOTICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1991; Released: November 8, 1991

Comment Date: February 28, 1992
Reply Comment Date: March 31, 1992

By the Commission:

I. INTRODUCTION

1. This proceeding is initiated in response to a Petition for Rule Making (RM-7188) filed by the National Association of Broadcasters (NAB) on September 25, 1989, and a November 1990 report to the Commission from the Michigan Emergency Communications Committee (MECC), Emergency Broadcast System (EBS), regarding a field test of a shortened EBS alert tone. In its Petition NAB urged the Commission to revise its rules to permit broadcast stations to: (1) shorten the length of the EBS attention signal; (2) revise the EBS test script; and (3) activate, monitor and fully control EBS system operations by remote control. The Michigan report documented the results of a six-month field test authorized by the Commission to determine the effects of utilization of a shortened EBS tone length on the reliability of the present EBS system.

2. The Notice of Proposed Rule Making (NPRM) portion of this proceeding is for the purpose of proposing amendments to the Commission's Rules that would reduce the length of the EBS two tone attention signal to a minimum of eight seconds and a maximum of 25 seconds. The amendments proposed would also reduce the time delay incorporated in the EBS activation or demuting process to a minimum of three seconds and a maximum of four seconds of tone reception which would ensure that the EBS alert tone will be audible for a period of from four seconds to 22 seconds. Additionally, on our own motion, we are proposing an amendment to the EBS rules that would add a new rule section prohibiting broadcast stations from any transmission of the EBS attention signal tone, the broadcast of any recording of the attention signal, or the transmission of any other simulation of the attention signal tone in any circumstance other than in an actual national, state, or local emergency or for the purpose of an authorized test of the system. The proposed rule is intended to emphasize how important we believe the EBS system is and to underscore our determination to deal severely with the broadcast of any false or deceptive EBS emergency warnings by broadcast stations.

3. With regard to the NAB's proposals to revise the EBS test script and to allow the activation, monitoring and full control of EBS System operation, by remote control, we are not persuaded, at the present time, that there is sufficient information or basis to include such proposals in the NPRM. We do, however, believe that a Notice of Inquiry (NOI) is appropriate concerning those matters in the context of this proceeding in order to solicit more information and comments from the broadcast industry and the public regarding possible changes.

II. BACKGROUND

4. The purpose of the EBS system is to give federal, state and local governments a means of providing emergency notification and information to the general public in times of actual national, state or local emergencies. It was established in 1964 and replaced the Control of Electromagnetic Radiation (CONELRAD) emergency communications system. EBS consists of the voluntary participation of radio and television stations, the cable industry and other nongovernment industry entities, linked electronically to one another and to participating federal, state and local government agencies.

5. The Commission's Rules generally prescribe (1) technical standards for the EBS two-tone attention signal that is used as an interstation signalling technique and to alert the public and activate EBS receivers; (2) procedures for stations to follow in the event that the EBS system is activated; (3) definitions that accord particular status to certain broadcast stations, depending on the extent of EBS responsibility held by those stations; (4) EBS testing requirements; and (5) pertinent administrative matters related to the system's operation. See Subpart G of Part 73 of the Commission's Rules, Section 73.901 through 73.962, 47 C.F.R. Sections 73.901 - 73.962.

6. Our EBS Rules impose several obligations on radio and TV licensees. All broadcast station licensees are required to install and maintain equipment capable of detecting (decoding) the EBS attention signal and associated emergency programming transmitted by other radio or TV stations. Additionally, all broadcast licensees, except noncommercial educational FM stations operating with 10 watts or less and low power TV stations, must install and maintain equipment capable of generating (encoding) the EBS attention signal. All stations must conduct and log a test of the EBS system at least once each week on a random basis in order to check for the proper operation of both encoding and decoding equipment. Also licensees must, in an EBS test, use a standardized test script that is specifically prescribed in the EBS Checklist. If a coordinated state or local EBS test is conducted, broadcasters and officials are free to develop their own script.

7. The NAB, by its Petition for Rulemaking, has requested three of the proposed rule changes discussed below. The NAB stated its belief that the proposed changes would improve the EBS system and thereby better serve the public interest. The Commission originated the proposed rule change that would prohibit false and deceptive EBS emergency warnings.

III. DISCUSSION

A. Reduction of EBS Two Tone Attention Signal Length

8. Section 73.906 of the Commission's Rules, 47 C.F.R. Section 73.906 (1988), defines the technical characteristics of the EBS attention signal. The attention signal is a unique combination of two tones, 853 and 960 Hz, not normally used in any other audio source available to the public. It has two important purposes. As a result of activating EBS receivers, the signal is used as an interstation signaling system. By way of its unique sound which commands the attention of listeners, the signal also serves as an alerting system for the public. The Commission's Rules require a minimum duration for the attention signal of 20 seconds. See 47 C.F.R. Section 73.906(d) specifying required tone durations. The maximum duration allowed is 25 seconds. See also 47 C.F.R. Section 73.940 requiring EBS encoders to generate tones of required duration. A signal duration of between 20 to 25 seconds and a decoding time of between eight and 16 seconds provides four to 17 seconds for the listener to hear and identify the tone. The Commission chose this scenario in 1974 to accommodate the level of technology then available for EBS decoder devices. See FCC Order 75-930, 40 Fed. Reg. 158, August 14, 1975, specifying type acceptance and certification parameters for EBS attention signal equipment. For technical reasons, longer attention signal lengths provide greater assurance that the signal will be successfully decoded.

9. The overall length of the required test transmission has concerned a number of NAB member stations. Those stations believe that, by transmitting the full 20 to 25 seconds of the attention signal along with the current test script, many listeners and viewers become annoyed and may either tune to another station or turn the receiver off. The NAB believes that the lengthy signal has become counterproductive and that to the extent that audiences "tune out" on hearing the attention signal, one of the principal purposes of the EBS attention signal -- advising the public that an emergency may be present -- is frustrated. The NAB believes that due to listener and viewer "tune out", the effectiveness of EBS may actually be diminished. It asserts that a shorter EBS tone would better serve the public interest by minimizing such "tune out."

10. NAB requests, therefore, that the Commission explore in a rulemaking proceeding the possibility of shortening the length of the EBS attention signal. NAB submits that the minimum duration of the signal should be reduced to 8 seconds and the maximum duration of the signal, 25 seconds, should be retained. That would allow station licensees to shorten voluntarily, the length of the EBS test transmissions. The NAB further asserts that adoption of a two to four second time delay for EBS decoders will provide an audible tone for a period of between four and six seconds; that current decoders can work reliably on tone durations of substantially less than 20 seconds; and that existing EBS encoders can be modified easily and inexpensively for operation with a shorter tone. NAB also asserts that decoders in the hands of the public also can be modified easily. The NAB submitted with its Petition a consultant's report that supported shortening the time for the EBS two tone attention signal. We recognize that there may be good reason for allowing stations to continue tone transmissions up to 25 seconds since there are many portable decoder/receivers in use that require the longer transmission time to properly activate. Those receivers are primarily used in the midwest tornado belt, in areas that experience other types of severe weather, and near nuclear power plants.

11. On August 8, 1989, at Michigan Emergency Communications Committee's (MECC) request, the Commission granted MECC permission to conduct a field test for a six-month period from October 1, 1989, to March 31, 1990, in the Lansing and Central Michigan EBS operational area to determine any possible negative effects of changing the length of the present EBS alert tones from the present 20-25 second length to a reduced length of time. The MECC report concluded the following:

> (a) The results of the field test indicated that adoption of a shortened EBS tone length of approximately eight seconds and a receiver demute time of approximately four seconds had no apparent detrimental effect on system reliability despite variations in programming formats, whether the monitored station was AM or FM, or whether reception was local or distant.
>
> (b) Modification of existing FCC rules to allow stations to select an appropriate length from not less than eight (8) seconds to the present 25 seconds upper limit would seem to be a prudent and flexible enhancement to the EBS system. With adoption of such new standards, the FCC, NAB and other interested parties should continue to encourage the use of EBS for local and state emergencies as well as for its continuing national role.
>
> (c) For the purpose of the tests, relatively simple and low-cost component changes were made to accomplish the shortened tone generation and demute times. Should a shortened tone and demute specification be adopted, requests should be made to manufacturers of current units in the field to supply their specific recommendations for circuit modification to accomplish the proposed new standards on their units.
>
> (d) Manufacturers of new models of EBS encode and decode units may wish to make the length of the encode signal and demute time able to be field selectable by the user within the FCC mandated limits.
>
> (e) If any changes are adopted, there should be a two step phase-in of the shorted tone length. The Commission could first set a reasonable length of time for conversion or replacement of EBS decoders conforming to a new shorter demute time, then those stations who elect to reduce the length of the EBS alert tone could do so.

We note that any technical changes to encoders or decoders affecting performance would require new equipment authorization grants to be issued to manufacturers by the Commission.

B. Prohibition of False and Deceptive EBS Emergency Warnings

12. On May 15, 1991, The Commission issued a Public Notice, FCC 13115, emphasizing the importance of the Emergency Broadcast System and advising and warning broadcast licensees that the broadcast of false or deceptive

emergency warnings is a serious violation of a licensee's fundamental obligation to serve the public interest. The EBS system and its unique two tone attention signal were designed for and intended to be used only in circumstances involving true national, state, or local emergencies. The transmission of a false or deceptive EBS attention signal, whether such transmission involves the activation of actual EBS tone generating equipment, a recording thereof, or any simulation thereof, severely undermines the integrity of the EBS alert system and will not be tolerated by the Commission. To underscore our determination to prevent any misuse of the EBS alert signal, we are proposing a new Rule Section 73.944 that would prohibit false and deceptive EBS attention signals. While such broadcasts are presently prohibited by Section 325(a) of the Communications Act, 47 U.S.C. Section 325(a), we believe that this matter is so important that a specific rule section in the EBS rules is also warranted. The addition of such a rule would serve to further highlight our concern in this matter and provide greater visibility to the prohibition.

C. EBS Test Script

13. Section 73.961(c) of the Commission's Rules, 47 C.F.R. Section 73.961(c) (1988), prescribes the use of a standardized test script for EBS tests in the United States. The test script is contained in the EBS Checklist. It reads as follows:

> This is a test. This station (optional-insert station call sign) is conducting a test of the Emergency Broadcast System. This is only a test.... This is a test of the Emergency Broadcast System. The broadcasters of your area in voluntary cooperation with Federal, State and local authorities have developed this system to keep you informed in the event of an emergency. If this had been an actual emergency, (optional- Stations may mention the types of emergencies likely to occur in their area) the Attention Signal you just heard would have been followed by official information news or instructions. This station (optional-insert station call sign) serves the (operational area name) area. This concludes this test of the Emergency Broadcast System.

The same test script has been used for EBS tests aired for the past 15 years, with minor modifications. The NAB asserts that although the Commission has allowed some minor variations, a standardized national EBS test script may not be appropriate today. The NAB believes stations should be free to tailor the EBS tests to local conditions. It asks the Commission to permit local radio and television stations to author EBS tests individually, provided certain minimum information is included. The NAB stated that, for example, a local station could announce the availability of air raid shelters, red cross centers, hospitals, etc. With a variety of test announcements, the station could use the opportunity of the EBS test to impart useful, community-oriented information. The NAB suggested that at a minimum, an appropriate message should contain: (1) notification that a test is beginning; (2) notification of the service area of the station conducting the test; and (3) notification that the test is concluded. The NAB stated that a rulemaking proceeding should consider what information should be required as part of an EBS test script. It believes that an EBS test consisting of an 8 to 10 second attention signal and a locally-authorized test script can continue to fulfill the purpose for which standardized periodic testing was originally intended.

14. Concerning changes to the EBS test script, we are mindful that additional changes to the rules which allow stations to rewrite the test script announcement for their own localities could reduce and/or eliminate standardization. We do hold standardization and consistency to be very important in the administration of and for the continued success of this EBS program. The test script announcement, as it presently appears in the EBS Checklist, provides for description of a specific type of emergency as well as the station call sign and operational area that station serves. Due to numerous requests and suggestions to staff, however, we believe that it would be beneficial for the Commission to consider comments from all interested parties regarding potential changes to the EBS test script and/or Checklist.

D. Monitoring and Remote Control Requirements

15. The Commission's Rules contain the requirement that stations monitor and respond to EBS system alerts. See 47 C.F.R. Section 73.932 (1988). Section 73.932(a) requires that each station licensee provide arrangements for "human listening watch or automatic alarm devices" that enable the station staff "at normal duty locations" to be alerted "instantaneously upon the receipt of the attention signal and to immediately monitor the emergency programming." In addition, Sections 73.933 through 73.937 set forth procedures to follow in the event of a national, state or local level emergency action notification. The NAB states that the Commission appears to have ensured that station licensees can be immediately responsive to EBS test transmissions and, of course, genuine emergencies, but that the rule itself merely states that its purpose is to ensure effective off-air monitoring in accordance with Section 73.931(a)(3).

16. The NAB notes that in September 1989, the Commission issued a Public Notice clarifying its rules pertaining to broadcast station remote control, operation. See Public Notice; FCC 88-194; Clarification of the Commission's Rules pertaining to broadcast station transmitter remote control operation, released September 12, 1989. There the Commission addressed certain rules pertaining to EBS equipment and operation when off-premises remote control points are used. While some latitude was granted regarding the logistics of off-premises monitoring and control, the Commission still requires that a station staff member monitor the EBS receiver itself and have the capability to activate the EBS encoder immediately and promptly broadcast EBS test and emergency action announcements. Thus, if off-premises remote control is used, there must be actual EBS monitoring and control equipment at that location.

17. NAB urges the Commission to consider relaxing its EBS monitoring and remote control requirements. It states that with the telecommunications technology available today, it believes that greater technological flexibility can be accorded to station licensees without unduly frustrating the purposes of the Commission's EBS rules; that stations should be allowed to monitor, activate and fully control EBS operations by remote control, without the requirement that EBS equipment be present at the distant control point; and that easily available technology can notify any designated member of a station's staff, wherever he or she might be located, and provide for immediate

EBS monitoring and control. As with the EBS test script, we believe that it would be beneficial for the Commission to consider comments from all interested parties regarding monitoring and remote control requirements.

IV. SPECIFIC QUESTIONS

18. The Commission welcomes comments from all parties on any issue within the scope of this proceeding. In order to assist commenting parties to formulate their responses and to facilitate addressing as many relevant issues as possible, we are posing a list of questions, which may be used as a guideline. Commenting parties are not required to address all these questions, nor are they required to use them at all. We do request that if a party addresses a question listed, that they identify the question by number in the comments they submit.

Question 1. How would modification of existing FCC rules to allow stations to select an attention tone signal length from not less than eight (8) seconds to the present 25 seconds upper limit affect or be likely to affect the alerting capability of the EBS?

Question 2. How would a two tone attention signal standard of eight to 25 seconds affect or be likely to affect the overall operations of the EBS? Would such a dual standard, if permitted, significantly affect the number of consumer receivers which presently activate on the longer tone?

Question 3. How many EBS tone activated consumer receivers are in use in homes and nonbroadcast facilities? How would owners of these receivers be impacted if the Commission allowed stations to shorten the attention signal tone?

Question 4. What effects would there be if a station were to shorten the attention length in an area with many consumer receivers in use?

Question 5. If the Commission does elect to change the required length of the two tone attention signal, how much time should licensees be permitted to replace their broadcast station EBS equipment?

Question 6. Should the Commission modify the EBS test script to allow for further contingencies during testing and/or activation of the EBS? If so, what should these changes be?

Question 7. Can the EBS Checklist be further improved, made more understandable and simplified? If so, what changes and/or additions could be incorporated?

Question 8. Would an end of message tone or other addition to the EBS test or alert transmission significantly enhance operational capability? If so, how would the(se) change(s) improve operations?

Question 9. Should changes be made to our EBS rules regarding remote control and automatic/unattended operation? If so, what changes can be made which would more precisely codify what is expected of stations operating under the EBS of the rules?

V. CONCLUSION

19. In this Notice, we are proposing changes to our rules which would result in a shortened EBS two tone attention signal and prohibit false or deceptive EBS emergency warnings. (see Appendix A). We are also initiating a Notice of Inquiry to solicit comments concerning changes in the EBS test script and Checklist and in the EBS rules which govern remote control operations.

20. The Commission believes that a reduction in attention signal time and prohibition of false or deceptive emergency warnings are in the public interest. However, we wish to solicit comments from all interested parties regarding the perceived effect the shortening of the EBS two tone attention signal may have on operational, as well as technical, parameters. Review of the MECC Report and other parameters indicate that adoption of a reduced two tone attention signal is feasible from a technical standpoint if all receivers/decoders are required to be activated by the shorter tone.

21. While we are not convinced that additional modification of the EBS test script, as presently written, is warranted, we will nevertheless accept, entertain and carefully consider all comments on that matter. Additionally, we also wish to solicit ideas, comments and opinions from individual users on how any part of the EBS Checklist may be improved upon, and we request any specific suggestions and comments in that regard.

22. We also believe that further examination of remote control and automatic/unattended operation as they pertain to EBS is warranted. We solicit comments and proposals of any other potential enhancements or changes, such as an EBS end of message tone. Parties submitting comments are requested to be as specific as possible regarding any technical details. We will carefully consider all submissions from parties who may provide information and/or arguments for appropriate rule changes designed to increase flexibility and reduce the regulatory burden on broadcasters as well as Commission staff.

VI. PROCEDURAL MATTERS

23. Initial Regulatory Flexibility Act Analysis. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, h) the Commission's initial analysis is as follows:

I. Reasons for Action: Receiver and semiconductor technologies have dramatically improved during the last several years. At the time EBS was initially implemented, it was necessary to have a tone signal of 20 seconds or more in length to effect reliable operation of the EBS two tone attention signal receiver/decoder. With the advancement of technology, reliable operation of decoding circuitry makes it unnecessary to continue sending a long duration EBS attention signal.

II. Objectives: The objective of this Commission action is to implement a more efficient method of utilizing the EBS two tone attention signal and to solicit comments concerning possible changes in the EBS test script and Checklist, remote control rules, or other EBS matters.

III. Legal Basis: Action is proposed in accordance with Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154 (i) and (o) and 303 (r).

IV. Description, Potential Impact and Number of Small Entities Affected: The proposed Rule changes would modify the Commission's rules dealing with the Emergency Broadcast System. Approximately 12,500 AM, FM, and TV broadcast stations and approximately six equipment manufacturers will be affected by the proposed rule

making. Proposed modifications to EBS encoders and decoders is projected to cost manufacturers and/or users approximately $400 per unit.

V. Recording, Record Keeping and Other Compliance Requirements: Stations would be required, as they presently are, to keep records of when encoders and decoders are taken out of service for any modifications adopted and when they are returned to operation.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule: None.

VII. Any Significant Alternatives Minimizing The Impact on Small Entities and Existing Licensees and Consistent with The Stated Objectives: None.

24. Paperwork Reduction Act Statement. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

25. Comment Provisions. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 28, 1992, and reply comments on or before March 31, 1992. Parties submitting comments should include any statistical data or analyses and the methodology for arriving at their conclusions in their comments. Appendix A contains the rule sections proposed to be changed by this proceeding. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of Secretary, Federal Communications Commission, Washington, D.C., 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

26. Ex Parte Considerations. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. See generally Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding.

27. In general, an ex parte presentation is any presentation directed to the merits of outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written ex parte presentation shall provide, on the same day it is submitted, two copies of the same, under separate cover, to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

28. Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation. Section 1.1206.

29. ACCORDINGLY, IT IS PROPOSED that, pursuant to the provisions of Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151,154(i) and (o), and 303(r), Part 73, Subpart G, of the Commission's Rules and Regulations BE AMENDED as set forth in the Appendix below.

30. IT IS FURTHER ORDERED, that pursuant to the provisions of Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), and 303(r), there is HEREBY INSTITUTED a Notice of Inquiry into certain matters discussed above.

31. IT IS ORDERED, That a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

32. For further information on these proceedings, contact William O. Browning, FCC Field Operations Bureau, Room 720, 1919 M Street, N.W. 20554, 202/632-3906.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 73, Subpart G, proposed to be amended as follows:

1. The authority citation for Part 73, Subpart G, continues to read as follows:

AUTHORITY: Sections 1, 4(i) and (o) and 303(r), Communications Act of 1934, as amended.

2. Section 73.906 is proposed to be amended by revising paragraph (d) to read as follows:

73.906 Attention Signal

* * * * *

(d) Time period for transmission of tones. The two tones with the characteristics specified above shall automatically modulate the transmitters simultaneously at the resulting level for an automatic time period of not less than 8 seconds nor longer than 25 seconds.

3. Section 73.940 is proposed to be amended by revising paragraph (d) to read as follows:

73.940 Encoder Devices

* * * * *

(d) Time period for transmission of tones. The encoder shall have timing circuitry that will automatically allow for the generation of the two tones simultaneously for a period of not less than 8 seconds nor longer than 25 seconds.

* * * * *

4. Section 73.941 is proposed to be amended by revising paragraph (a) (1) to read as follows:

73.941 Decoder Devices

* * * * *

(a) * * *

(1) Time delay. A time delay of a minimum of 3 seconds but not more than 4 seconds of tone reception shall be incorporated in the activation process to ensure that the tones will be audible for a period of from 4 seconds to 22 seconds.

* * * * *

5. A new Section 73.944 is proposed to be added to read as follows:

73.944 Prohibition of false or deceptive EBS Attention Signal or simulation thereof.

No licensee, whether a participating or nonparticipating broadcast station, shall transmit an EBS Attention Signal, recording or other simulation thereof in any circumstance other than in an actual and real national, state or local emergency or for the purpose of an authorized test of the EBS system.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BUTTE CELLULAR GROUP File No. 10628-CL-P-734-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 734, Northern Mariana Islands

FAIR OAKS CELLULAR PARTNERS File No. 10960-CL-P-549-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 549, New Hampshire 2 - Carroll

KENT S. FOSTER File No. 10414-CL-P-666-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 666, Texas 15 - Concho

PACIFIC NATIONAL CELLULAR File No. 10310-CL-P-402-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 402, Illinois 9 - Clay

PEGASUS CELLULAR TELEPHONE CO. File No. 10750-CL-P-493-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 493, Mississippi 1 - Tunica

PROGRESSIVE CELLULAR III B-2 File No. 10008-CL-P-317-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 317, Alaska 3 Haines-3

TEN-TEN GENERAL PARTNERSHIP File No. 10616-CL-P-361-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 361, Florida 2 - Glades

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1991; Released: November 15, 1991

By the Commission:

1. The above captioned non-wireline cellular applicants (with the exception of two) for rural service areas (RSAs) seek reconsideration of the actions by the Mobile Services Division of the Common Carrier Bureau (MSD) returning their applications as unacceptable for filing. This is the Commission's first action on the application filed by Fair Oaks Cellular Partners (Fair Oaks). These six applications have been referred to the Commission under Section 1.106(a)(1) of the rules in order to expedite the resolution of the matters raised. Progressive Cellular III B-2 (Progressive) has filed a petition for reconsideration of the Commission decision affirming dismissal of its application. *See* Progressive Cellular III B-2, 5 FCC Rcd 2772 (1990). The primary reason for return of the applications was their failure to comply with the Commission's firm financial commitment qualifications rule. Accordingly, the listed applications have been addressed in this one order.[1] For reasons discussed below, we dismiss one application, affirm the dismissal of four applications, affirm the action denying the application for review of one application, and reinstate one application.

I. BACKGROUND

2. The Commission began licensing cellular telephone systems in 1983. Since that time, it has been a basic requirement that applicants demonstrate that they are financially qualified. When we proposed to adopt a lottery selection process for cellular applications, we stated:

> In order for applications to be included in the lottery, they will have to be acceptable for filing under our cellular rules. We will not permit applicants to meet our strict standards by means of later-filed amendments.

Notice of Proposed Rule Making, 48 Fed. Reg. 51493, 51495, November 9, 1983. In *Cellular Lottery Rule Making*, 98 FCC 2d 175 (1984) (*Lottery Order*), we reiterated that "[a]pplicants must show financial ability (Section 22.917)... before their applications will be accepted for filing." *Lottery Order*, 98 FCC 2d at 213. We further stated that "[t]he staff will carefully pre-screen the cellular applications to ensure that deficient applications are not included in the lottery." *Id.* at 185. These procedures were made clear prior to the filing of Round IV (markets 91-120) cellular applications.

3. The Commission subsequently amended its financial rules for applicants proposing to provide cellular radio service to RSAs to require a firm financial commitment at the time their applications are filed.[2] The concern stemmed from the submission of numerous speculative applications in MSA markets 121-305 where the absence of a firm financial showing prior to lottery enabled application preparers to market large numbers of applications at little cost. In adopting the stricter rule, we intended to preserve the integrity of our licensing process by deterring the filing of speculative applications. We stated that the financial showing is the primary "applicant unique" portion of an application, without which all applicants could submit identical applications except for the name and address. *Fourth Report and Order*, 4 FCC Rcd 2542 (1988). As reflected in the rules, non-wireline applicants are thus required to demonstrate at the time their applications are filed that they either have the funds available or that they have a firm financial commitment from a lender to provide the necessary funds.[3] Having outlined the Commission's firm financial commitment standard, we turn now to consideration of the captioned applications and the related petitions.

II. DISCUSSION

A. Financial Commitment Letter from Equipment Vendor

4. Schuykill Mobile Fone, Inc. (Schuykill) and Optima Cellular Partnership (Optima) (jointly, petitioners) have filed separate petitions to dismiss or deny the application of Fair Oaks Cellular Partners (Fair Oaks) for authority to construct and operate a cellular system in the New Hampshire 2-Carroll RSA market. Both petitioners are competing applicants for the New Hampshire authorization. They argue that the Fair Oaks application contains a financial commitment letter from Cellular Equipment Management Services (CEMS), an entity which petitioners claim is not a *bona fide* financial institution having net liquid assets of $2,000,000, the amount needed to support its commitment to Fair Oaks.

5. The petitioners maintain that there is no evidence that CEMS is the financial arm of a capital equipment supplier, and that the "certification" in the commitment letter is unsubstantiated. Optima contends that because the Chairman of CEMS, Gene Greenwell (Greenwell), has filed for personal bankruptcy, CEMS cannot be a *bona fide* lender. The petitioners note that the Commission has not seen CEMS' financial statement, been given the identity of CEMS' owners, or told whether Greenwell is an owner. According to Optima, CEMS appears to be an affiliate of Computerized Cellular Engineering, Inc. (CCE), the contact representative shown at Item 4 of Fair Oaks' FCC Form 401 application. Optima notes that CCE is well known to the Commission as the company whose bank account had insufficient funds to cover filing fee checks associated with hundreds of RSA applications.

6. In response, Fair Oaks states that these assertions are based on innuendo and are not supported by affidavit as required by Section 309(d)(1) of the Act. With regard to Optima's petition, Fair Oaks contends that the personal bankruptcy of Greenwell and the apparent association of CEMS with CCE raise no material questions concerning CEMS; that Optima does not describe the effect such affiliation might have; and that Schuykill does not present any evidence that CEMS is not as well known as Motorola, Inc. (Motorola) or NovAtel Communications, Ltd. (NovAtel). Fair Oaks maintains that CEMS is and has been a *bona fide* financial arm of Plexsys Corp. (Plexsys), a capital equipment supplier. According to Fair Oaks, CEMS became the exclusive nonwireline RSA distributor of Plexsys cellular systems in September, 1988, and is the financial arm of Plexsys just as ASTRONET is to Mitsubishi and Motorola Credit Corp. is to Motorola.

7. Moreover, Fair Oaks asserts that with its opposition to the petitions it submitted a consolidated balance sheet of CEMS' wholly-owned subsidiaries showing that CEMS has total assets of $20,036,840 as of June 30, 1990; current liabilities of $246,848.61; and total long term liabilities of $1,939,416. According to Fair Oaks, CEMS' total net worth is more than $17 million, which is more than enough money to demonstrate CEMS' ability to fund its $2 million commitment to Fair Oaks. Alternatively, Fair Oaks has submitted a financial commitment letter from Motorola to support its financial qualifications.

8. *Decision*. Section 22.917(c)(5) of the rules allows firm financial commitments from the financial arms of capital equipment suppliers. However, the CEMS commitment letter fails to include information that establishes it as a financial arm of a capital equipment supplier with sufficient funds to support its commitment, as required. The commitment letter from CEMS, dated November 10, 1988, claims that CEMS "has available from commmitted [sic] sources the funds necessary to fulfill its obligations hereunder, and that the subject funds are not committted [sic] to any other project." Neither the applicant nor CEMS identified the "committed sources" that would fund the proposed cellular project.[4] In contrast, the financial arms of Mitsubishi and Motorola provide detailed information concerning their parent corporation, including annual reports and detailed, audited balance sheets to demonstrate their financial strength. Neither Fair Oaks nor CEMS has provided comparable information. The "Purchase Agreement" between Plexsys and CEMS submitted by Fair Oaks in response to a staff request merely establishes CEMS as the "'exclusive' FCC engineering or license application firm authorized to re-sell PleXell cellular systems." The Purchase Agreement defines the terms by which CEMS can purchase products and services from Plexsys but does not state that Plexsys will fund financial commitments for proposed cellular projects. The consolidated balance sheet of CEMS and its subsidiaries, also submitted with the Purchase Agreement, falls far short of establishing the financial ability of CEMS.[5] Moreover, Fair Oaks' submission of a financial commitment from Motorola, filed for the first time with its opposition to the petitions to deny in this proceeding, is filed too late. *Fourth Report and Order*, 4 FCC Rcd at 2545. In sum, Fair Oaks did not submit an adequate firm financial commitment letter from its equipment supplier when it filed its application, and failed to provide sufficient support in its response to a subsequent staff request. Accordingly, Fair Oaks' application will be dismissed.[6]

B. Financial Commitment Letter Filed With Microfiche But Not Paper Copy of Application

9. The application of Pegasus Cellular Telephone Company (Pegasus) to serve the Tunica, Mississippi RSA was dismissed by the MSD for failure to include a firm financial commitment letter in its initial application. Pegasus argues that the MSD is mistaken and that a copy of a

NovAtel financial commitment letter, dated July 8, 1988, was, in fact, "submitted with the application as originally filed in microfiche form, and subsequently filed in paper form." It claims that the only difference between its microfiche and the paper copy was the inclusion of a one page notification in the paper copy of the application alerting the staff person processing the application to the fact that the original of the financial letter was included in the original paper copy of the Idaho 2 application. *See* 47 C.F.R. Section 22.6(d).

10. *Decision.* Due to an apparent clerical error by Pegasus, the original paper copy of the application for Tunica did not contain the NovAtel commitment letter, whereas a microfiche copy of the application did include the letter. This resulted in the submission of no financial information with the paper copy except a "Note To Commission Staff Person Processing This Application,"[7] (Note) and a "Declaration and Certification By Applicant." It is clear from the Note that the two exhibits exist, had been submitted in microfiche, were intended to be included in the paper copy of the application, and were referenced in the paper copy. This kind of clerical error is distinguishable from other cases of omission which rendered applications defective.[8] Here, the microfiche copy included the financial commitment information required, and staff, while properly relying on the paper copy during processing, was fully aware of the exhibits in the other application. Accordingly, we will reinstate Pegasus' Tunica application.[9]

C. Financial Requirements Under Section 22.917(c)(5)

11. Ten-Ten General Partnership's (Ten-Ten) application was dismissed because its financial commitment letter does not indicate that the bank examined the financial condition of Ten-Ten and that the applicant is creditworthy, as required by Section 22.917 (c)(5)(i) of the rules. Nor does the commitment letter state that the bank's decision is based solely on its relationship with the applicant and that the commitment is not in any way guaranteed by an entity other than the applicant, as required by Sections 22.917(c)(5)(iv) and (v) of the Commission's rules.

12. In a Memorandum Opinion and Order, *Kent S. Foster*, 5 FCC Rcd 1700 (Mob. Ser. Div.), the MSD dismissed the application of Kent S. Foster (Foster) for failure to comply with the Commission's firm financial requirements. The MSD found that Foster's commitment letter from the National Bank of Washington (NBW) was defective because it was "[s]ubject to the National Bank of Washington's loan committee"; the commitment letter did not state that the bank had assessed the applicant's creditworthiness; the bank's commitment was based solely on its relationship with Foster; the applicant did not present evidence in his original application that he could satisfy the bank's collateral requirement; and NBW's additional letters were insufficient and in any event could not cure defects in the original application.

13. Ten-Ten argues that Section 22.917(c)(5) does not require a particular form for the commitment letter or that the individual items in the rule be specifically referenced. Moreover, the applicant contends that the MSD has previously allowed financial commitment letters similar to the one filed by Ten-Ten, and has reviewed and granted rural cellular applications containing financial letters which did not include one or more of the statements required by the rules. Ten-Ten maintains that a review of other nonwireline RSA cellular applications reveals that only two RSA applications have been dismissed because the financial commitment letters failed to contain the statements listed in Section 22.917(c)(5). Kent S. Foster and Ten-Ten assert that the MSD's statement that it would have disallowed other applications which contained similar defective financial letters had these defects been brought to its attention,[10] is not tenable legally. Ten-Ten argues that the Commission must treat similarly situated applications in a consistent manner, citing *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 974, 977 (D.C. Cir. 1974), and *Violations By Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 644 (1974). Ten-Ten suggests that the Commission should, at the very least, allow it to file a minor amendment pursuant to Section 22.918(b) to clarify that the bank complied with the requirements set forth by the Commission in *Fourth Report and Order, supra.*

14. Foster also argues that the original financial letter from NBW, which committed $2,000,000 for a loan to construct and operate a cellular system in the Texas 15 Concho market, fairly includes the required statements and was based solely on the bank's relationship with Foster and his creditworthiness. Foster states that any doubt as to the meaning of the letter was resolved in NBW's renewal letters which were filed in the proceeding below. Moreover, Foster contends that the MSD's decision was at odds with many other Commission decisions where applications with defective financial letters were granted. Alternatively, Foster requests an evidentiary hearing and/or a waiver.[11]

15. *Decision.* Sections 22.917(c)(5)(i), (iv) and (v) of the rules specifically require that a firm financial commitment include a statement that the lender (1) has examined audited financial statements, where applicable, and has determined that the applicant is creditworthy; (2) states a willingness to enter into the commitment solely on the basis of the relationship with the applicants, and (3) states that the commitment is not in any way guaranteed by any entity other than the applicant. While Ten-Ten is correct in suggesting that there is no particular form for the commitment letter, there is no ambiguity regarding the required content in substance. We need only examine Ten-Ten and Foster's applications, as they were originally filed, to see that those rule requirements are not met. In each case, the applicant's original bank letter failed to include statements that the bank had examined the financial condition of the applicant and had determined that the applicant is creditworthy, that the bank's willingness to enter into the commitment is based solely on its relationship with the applicant, and that the commitment is not in any way guaranteed by any entity other than the applicant. *See* Sections 22.917(c)(5)(i), (iv) and (v). Whether the MSD staff has erred in other cases and approved applications containing inadequate financial showings is not binding on the Commission. *See Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).[12] Therefore, we hold Ten-Ten and Foster to strict compliance with our rules and affirm the MSD's dismissal of their applications for failure to comply with the submission requirements of Sections 22.917(c)(5).

16. Further, we must reject Foster's request for waiver of Section 22.917. Foster has not alleged any unusual circumstances that would prevent his compliance with the rule requirement. Likewise, Foster has presented no evi-

dence that he is entitled to a hearing. There are no material facts at issue here and thus, there is no need for a hearing.

D. Firm Financial Commitment Letters From Brad Peery, Inc.

17. Three applications filed by Progressive Cellular III B-2 (Progressive), Pacific National Cellular (Pacific) and Butte Cellular Group (Butte), contain financial commitment letters issued by Brad Peery, Inc., (Peery) and were dismissed because the letters were deficient in that they failed to provide a firm commitment to provide financing. (For a detailed recitation of the facts regarding the Peery letter, see *Progressive Cellular III-B-2*, 5 FCC Rcd 2772 (1990).)

18. Progressive won the non-wireline lottery for the Alaska 3-Haines RSA. Subsequently, the MSD dismissed Progressive's application as unacceptable for filing because it did not have a firm financial commitment as required by the rules.[13] The MSD determined that the application was defective because Progressive is a partnership and the financial commitment letter was contingent upon Progressive forming a corporation. Progressive then filed a Petition for Reconsideration and Reinstatement with the Bureau in which it sought reinstatement of its application. No opposition pleadings were filed. The Bureau affirmed the dismissal of Progressive's application in a Memorandum Opinion and Order, *Progressive Cellular III B-2*, 4 FCC Rcd 5254 (Com. Car. Bur. 1989), (Bureau Order). An application for review of the Bureau Order was denied by the Commission in *Progressive Cellular III B-2*, 5 FCC Rcd 2772 (1990).[14] Now, Progressive has filed a petition for reconsideration of the Commission's action pursuant to Section 1.106 of the Commission's rules. Oppositions to the petition have been filed by RJL Cellular Partnership and CFL.

19. Progressive claims that the Commission erred in not ruling on whether its application was unacceptable for filing for failure to comply with the condition contained in its financial committment letter that the applicant "will establish a corporation . . . ." The application was ruled unacceptable because of the "incorporation" provision, as indicated in both the MSD Letter and Bureau Order.[15] Progressive, Pacific and Butte maintain that the dismissals of their applications based on the finding that Peery's letter required vendor financing as a condition precedent to Peery's commitment, improperly disregards the additional evidence from Peery showing that the commitment was unconditional, except for a requirement that these applicants be awarded an FCC construction authorization. The words "condition precedent," Progressive contends, do not appear in that letter. Moreover, Progressive and Pacific contend that the declaration by Peery under penalty of perjury states that his obligation under the letter "was and remains unconditional and absolute." Peery urges the Commission to accept this document as true in the absence of any credible and specifically contradictory evidence.[16] Finally, Progressive argues that requiring nonwireline entities to file a firm financial commitment with the application while not requiring the same of wireline applicants, denies Progressive due process and equal protection of the law.[17]

20. In its letter dated June 29, 1990, the MSD gave three reasons in support of its dismissal of Pacific's application. First, it stated that the Peery letter was not a firm financial commitment consistent with *Progressive Cellular III B-2*, 5 FCC Rcd 2772 (1990), which involved an identical Peery letter. Second, the MSD concluded that under the terms of the commitment letter Pacific had not obtained an alternative funding source as required by the commitment letter. Third, the MSD stated that Pacific's application could not be amended to include a new funding source. Pacific filed a petition for reconsideration of the MSD decision.

21. Pacific distinguishes its situation from that of Progressive because it never submitted an equipment vendor financing letter. Thus, the question of whether Pacific complied with the second term of the Peery letter does not exist. Pacific states it expressly rejected financing from Motorola and has held Peery to his obligation to provide financing.

22. Butte also relied upon a financial commitment letter from Peery to meet its construction and first-year operating costs. The terms of the letter were essentially the same as those in the *Progressive* case. After Butte's selection as the lottery winner, Butte filed an amendment to its application which included financial information regarding Ann C. Coltrin, a Butte partner, demonstrating her ability to fund the proposed cellular system. By letter dated March 9, 1990, the MSD found Butte's application unacceptable for failure to have a firm financial commitment. Butte filed a petition for reconsideration of this decision.

23. Butte argues, if vendor financing is deemed a condition to Peery's financial commitment, it still would not be a basis for finding Butte's application defective. According to Butte, the Commission has held that it assumes vendor financing is available without any demonstration of a financial commitment, absent a showing that the applicant's creditworthiness is in doubt. For support Butte cites *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 168 (1980).[18] Further, Butte asserts that in the past, the Commission has permitted applicants to amend their application to submit supplemental letters demonstrating that a bank is committed to provide the requisite financing citing *Intercontinental Communications Cellular, Inc.*, 4 FCC Rcd 2702 (1989), *affirmed sub nom. Saginaw Mobile Telephone System v. FCC*, No. 89-1295 (D.C. Cir. Mar. 21, 1990), *petition for rehearing filed* (May 7, 1990) (Saginaw); and *Corpus Christi Cellular Telephone Company*, 64 Rad. Reg. 2d (P&F) 1270 (Com. Car. Bur. 1988) (Corpus Christi).

24. *Decision*. The issues raised by Progressive, Pacific and Butte, focus on a common financial commitment letter from Peery that the MSD found defective. In *Progressive*, 5 FCC Rcd 2772, the Commission affirmed that Progressive did not demonstrate that it had a firm financial commitment for funds upon which it could rely to construct and operate its proposed cellular system, as required by Section 22.917(c) of the rules. It agreed with the Bureau's finding that the Peery letter required Progressive to obtain vendor financing as a condition precedent to Peery's commitment.

25. Section 1.106(b)(2) of the rules requires that, where the Commission has denied an application for review, a petition for reconsideration will be entertained only if (1) the petition relies on new facts or changed circumstances occurring since the last decision and (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters. The substantive issues raised by Progressive in its petition for reconsideration do not meet these requirements. Progressive offers no new

arguments or facts to support its arguments. As to Progressive's complaint that the Commission's decision did not address the incorporation provision of the Peery letter, we note that nothing in the rules requires the Commission to resolve additional qualification issues once it has determined that the application was properly dismissed on financial qualifications grounds.

26. Neither Pacific nor Butte demonstrated that they had a firm financial commitment upon which they could rely to construct and operate their proposed cellular system. The Peery letters in their applications are similar in all relevant aspects to the letter submitted by the applicant in *Progressive Cellular III B-2*, *supra*, which was rejected as defective by the Commission. By their Peery letters, Pacific and Butte are required to obtain vendor financing as a condition precedent to Peery's commitment to provide funds. Neither Pacific nor Butte presented evidence in its initial application that it received the required vendor financing. We therefore find no reason to treat the Pacific and Butte applications differently from Progressive.

27. Moreover, Butte's reliance on *Merrimack* is misplaced. There, the applicant's financial showing was evaluated by the Commission under the more lenient reasonable assurance standard. Likewise, the *Saginaw* and *Corpus Christi* cases Butte cites were filed under the reasonable assurance test where "amendments or further showings regarding the details of a loan syndication have traditionally been permitted." *Saginaw*, 4 FCC Rcd at 2704.[19]

28. Pacific's argument that it should be treated differently because, unlike Progressive, it did not submit an equipment vendor financing letter must be rejected. As noted above, the Peery letter does not represent a firm financial commitment and therefore Pacific failed to present evidence in its initial application to support its financial ability. Since the equipment vendor financing letter was not contained in the initial application filed with the Commission, it is irrelevant. Subsequent amendments to correct defective firm financial commitment showings are not permitted.[20] *See* 22.913(b)(3); *Cellular Lottery*, 59 Rad. Regs. (P&F) 407, 410 and n. 17, 18 (1985), *Bruce Shorsten*, 3 FCC Rcd 4409 (1988); *see also REM Communication*, 3 FCC Rcd 3705 (1988).[21] Therefore, based on our review of the documents submitted and the requirements of the Commission's rules, we affirm our previous decision in *Progressive* and the MSD's dismissal of the Pacific and Butte applications.

E. Waiver Requests

29. Finally, several applicants have requested, alternatively, that we grant a waiver of Section 22.917. They argue that they in fact have the money to build and operate their proposed cellular systems and granting the waiver will speed service to the public.[22] The language of Section 22.917 is clear, and the *Fourth Report and Order*, *supra*, gave applicants adequate notice that failure to include the required financial showing in their applications would result in dismissals. *See* 4 FCC Rcd at 2545. None of these applicants has demonstrated that there are unusual circumstances, as required by the rule governing waiver of the rules, which would justify not enforcing the financing rule. *See* 47 C.F.R. §22.19. Therefore, we deny the requests for waiver of the financial rule.

III. CONCLUSION

30. In summary, the Fair Oaks application is dismissed for failure to demonstrate that its financial commitment letter was from a *bona fide* capital equipment vendor with sufficient funds to support Fair Oaks' proposed cellular system. We reinstate the application of Pegasus Cellular Telephone because, through an apparent clerical error, its financial commitment letter was not included in the paper copy of the application, but was included in the microfiche. The dismissals of the applications of Ten-Ten and Kent S. Foster are affirmed for failure to comply with the requirements of Section 22.917(c)(5)(i), (iv) and (v). Finally, the dismissals of the Progressive, Pacific and Butte applications are affirmed. These applications contained defective financial commitment letters from Brad Peery, Inc., and failed to demonstrate sufficient financial resources at the time of filing.

IV. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED THAT the dismissals of the applications of Butte Cellular Group, File No. 10628-CL-P-734-A-89; Kent S. Foster, File No. 10414-CL-P-666-A-89; Pacific National Cellular, File No. 10310-CL-P-402-A-88; Progressive Cellular III B-2, File No. 1008-CL-P-317-A-88; Ten-Ten General Partnership, File No. 10616-CL-P-361-A-89, ARE AFFIRMED.

32. IT IS FURTHER ORDERED THAT the application of Pegasus Cellular Telephone Co., File No. 10750-CL-P-493-A-89 IS REINSTATED and is accepted for filing.

33. IT IS ALSO ORDERED THAT the Petition for Reconsideration filed by Progressive III B-2 and all other Petitions for Reconsideration for the dismissed applications ARE DENIED.

34. IT IS FURTHER ORDERED THAT the Petition to Dismiss or Deny filed by Schuykill Mobile Fone and Optima Cellular Partnership and Edward H. Peter, Jr. and Laurance D. Moon and the Opposition To the Petition for Reconsideration filed by Rita Capobianchi ARE GRANTED.

35. IT IS FURTHER ORDERED THAT the application of Fair Oaks Cellular Partners, File No. 10960-CL-P-549-A-89 IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Several of the petitions for reconsideration listed above have been opposed by Thomas Domencich and the Committee for a Fair Lottery (jointly CFL). Mr. Domencich was a competing applicant in all 428 Block A RSA markets established by the Commission. The Committee for a Fair Lottery is described as a voluntary association of RSA applicants formed for the purpose of monitoring the Commission's cellular lotteries, of which Mr. Domencich is a member. In its oppositions, CFL does not present new evidence and merely expresses support for the decisions returning the applications. Its pleadings have been considered in making these decisions.

[2] A firm financial commitment is the demonstration by an applicant that it is able to construct and operate the proposed cellular system for a period of one year. 47 C.F.R. Section 22.917(c).

[3] In the Fourth Report and Order, we stated that there was no evidence that wireline applicants previously abused the lottery process. Therefore, we saw no need to adopt additional regulatory measures for RSA wireline applicants. 4 FCC Rcd at 2544.

[4] In the *Fourth Report and Order, supra*, we stated that financial commitments from "questionable entities" would have to demonstrate that they have the funds available to cover the total commitments they made. We stated further that we would carefully scrutinize all financial arrangements to limit outside sources of financing to those which have been proven to be *bona fide*, commercially acceptable sources. 4 FCC Rcd at 2547.

[5] CEMS does not submit information demonstrating that Plexsys is the parent corporation of CEMS. CEMS did not submit a balance sheet for 1988, although one was requested by the staff. The information submitted in response to the staff request fails to include full financial statements, does not identify the relationship between Plexsys and CEMS and includes a 1990 balance sheet that is not audited and that does not conform with generally accepted accounting principles.

[6] The applicant's complaint that the petitions to deny are not supported by affidavit, as required by Section 309 of the Act and the Commission's rules, has merit. However, in reaching our decision herein, we have not relied exclusively on those petitions. Therefore, the applicants have not been harmed by petitioners' failure to file affidavits.

[7] The Note stated:

> Pegasus Cellular Telephone Company ("Pegasus") was an RSA lottery winner in the Idaho 2 - Idaho RSA (File No. 10067-CL-P-389-A-88). The original execution copies of Exhibits 2.1 and 2.3, were included in Pegasus' Idaho application. Accordingly, since Pegasus has won a second lottery, photocopies of these two exhibits are enclosed with this application. Please refer to Pegasus' application for Market 389 to view these originals.

[8] *See e.g.*, Fred Farley, 4 FCC Rcd 4670 (Com. Car. Bur. 1989) (wrong original paper copy of application filed); Lake Charles CellTelCo, 2 FCC Rcd 6389 (Mob. Ser. Div. 1987) (omission of response to Item 8 of Form 401); Macon Group, 2 FCC Rcd 5409 (Mob. Ser. Div. 1987) (transposed information on two antennas) and Lee Charles and Neva Brooks, 2 FCC Rcd 5886 (Com. Car. Bur. 1987) (minor amendment filed to correct minor responses and omissions).

[9] Given this decision we need not address Pegasus' further argument regarding its amendment for its second lottery win.

[10] The MSD stated:

> The mere fact that an application may have been granted which did not contain these statements does not serve as a precedent to allow the use of a defective commitment letter here. Had the deficiency been brought to our attention or had we discovered the non-compliance, we would have enforced the requirements of Section 22.917.

Kent S. Foster, *supra*, para. 12.

[11] Rita A. Capobianchi opposes Foster's petition, arguing that Foster's application was properly dismissed. Capobianchi contends that Foster offers essentially the same arguments on reconsideration that the MSD considered and rejected, and that the cases relied on by Foster are inopposite.

[12] We have reviewed the cases cited in Foster's petition to support his assertion and find that in only two cases does it appear that a defective application was granted erroneously by the staff. This is in contrast to the hundreds of applications in which the financial rule was correctly applied. In these circumstances, we believe Foster is being treated fairly because the rule has been enforced uniformly with only minor exceptions.

[13] *See* Letter from MSD to Progressive Cellular III B-2, (dated October 25, 1988).

[14] On April 3, 1990, the Commission issued a Public Notice, Mimeo No. 2438, announcing that the Commission would conduct lotteries on June 13, 1990, to select cellular radio applications in five rural service areas. In each market, lotteries had been held previously, but the winning applications had been found defective and dismissed. Two of the applicants, Progressive and Radiophone Corporation, requested a stay of the non-wireline lotteries for markets 317 and 413 which were scheduled for June 13, 1990. These requests were denied in Progressive Cellular III B-2 and Radiophone Corporation, 5 FCC Rcd 3507 (Mob. Ser. Div. 1990).

[15] Section 22.922 of the rules prohibits the assignment of a cellular application prior to the grant of a construction permit. The MSD and Bureau reasoned that compliance with the incorporation provision had to occur prior to Commission grant of the application because an applicant is required to demonstrate its financial qualifications before the Commission can grant construction authority. "Such a change in Progressive's ownership would run afoul of Section 22.922 of the Commission's Rules. . . ." 4 FCC Rcd at 5255.

[16] Pacific states that any questions about Peery's funding source to meet the commitment provided to applicants should be put to rest by its August 2, 1990 letter to Pacific and Nordberg's August 2, 1990 letter to Peery clarifying and reconfirming its financial commitment to Pacific. Pacific argues that the Commission accepts clarifications to financial commitments, such as those that identify the participants in a loan arrangement, citing Intercontinental Communications/Cellular, Inc., 4 FCC Rcd 2702 (1989), *affirmed sub nom.* Saginaw Mobile Telephone System · FCC, No. 89-1295 (D.C. Cir. Mar. 21, 1990), *petition for rehearing filed* (May 7, 1990) (Saginaw).

[17] On June 14, 1990, the Commission conducted a new lottery for the Alaska 3 RSA market and selected RJL as the winner. RJL opposes Progressive's petition for reconsideration, maintaining that Progressive has failed to demonstrate that it had a firm financial commitment at the time of filing and that the Commission's decision upholding the dismissal should be upheld.

[18] Butte contends that the MSD erred because it dismissed Butte's application without a hearing. Butte states that since the issue is whether its application was "blatantly defective" and subject to being returned pursuant to Section 22.20(a) of the Commission's rules, the Commission must find that Butte not only patently failed to meet a "particularized application standard" but also that it failed to make a good-faith effort in that regard.

[19] Furthermore, we reject Butte's argument that dismissal of its application without a hearing constitutes error. There are no material questions of fact that warrant a hearing.

[20] The additional letters purporting to clarify Peery's commitment to the applicants (*see* footnote 16), are also post lottery amendments that are unacceptable under the rules.

[21] We also reject the applicants' argument that their due process right to equal treatment is violated because wireline applicants do not have the same financial requirements as non-wireline applicants. In the Fourth Report and Order, we ex-

plained at length why we felt there was a reasonable basis for imposing disparate financial showings upon wireline and non-wireline applicants. *See* note 3, *supra*.

[22] Several of the applicants argue that the underlying purpose of the Commission's financial qualifications rules - to deter speculative applications - will not be undermined if the Commission grants them a waiver. These applicants give assurances that they will build and operate their proposed systems and some state they will accept "a no-transfer" condition on the authorizations. In filing their applications, the applicants submitted a "Transmittal Sheet for Cellular Applications" in which they certify that they intend to "construct and operate the station as proposed." Thus, the applicants' assurances at this date do not warrant waiver of the Commission's rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91- 281

IN THE MATTER OF

Rules and policies regarding calling number identification service.

NOTICE OF PROPOSED RULEMAKING

Adopted: September 26, 1991; Released: October 23, 1991

Comment Date: January 6, 1992
Reply Date: February 5, 1992

By the Commission:

1. The Commission hereby initiates a Notice of Proposed Rulemaking to establish federal policies and rules concerning interstate calling number identification service (caller ID). With the increasing deployment of Signalling System Seven (SS7) switching technology, a panoply of new services is becoming available to callers. Identification of the calling party number to the called party, including residential called parties, is among the most recent. Knowing the calling party's number not only facilitates identification for the called party, but also permits routing and call management options not previously available. As with other advances in technology, additional services are likely to arise as consumers, service providers and equipment manufacturers become more familiar with the new capabilities. As with many new technologies and services, regulatory issues need to be addressed and resolved to ensure that regulation is adaptive to new services and does not discourage the development of new choices for consumers. The Commission tentatively concludes that a federal model for the delivery of interstate caller ID services is in the public interest, and necessary for the introduction of interstate caller ID service into the marketplace. The Commission seeks comment on the analysis and proposals herein.

I. BACKGROUND

2. Caller ID service, calling number delivery service, calling line identification, calling number identification, directory number, and calling party identification are terms used interchangeably to refer to a relatively new telephone service offering which identifies the calling number to the called party. The service is most frequently referred to as caller ID service. Caller ID, currently offered on an intrastate basis, allows subscribers, when they receive local telephone calls, to have the local exchange carrier (LEC) transmit to them the telephone number of the station originating the call. The subscribers must purchase a "number identification device" which is connected to a network jack and then to the subscriber's telephone. Some telephones incorporate the number identification device into the telephone unit itself. The device displays the calling party's telephone number between the first and second ring via common channel signaling technology. Number identification devices and number identification capable telephones are customer premises equipment which manufacturers must register under Part 68 of the Commission's rules. Approximately sixteen types of such devices have been registered with the Commission. These devices currently retail for between sixty and one hundred dollars. Some models include a memory function, which can display, for example, the last fifteen telephone numbers to call the subscriber's number.

3. In addition to purchasing the number identification instrument, the customer must subscribe to caller ID service from the LEC. The service is currently tariffed at the state level in a growing number of states at a cost ranging from approximately six to ten dollars per month. Transmission of caller ID is made possible by the out-of-band signalling capabilities of SS7 technology being deployed by the telecommunications industry worldwide.[1] Under current deployment schedules of the LECs, in just a few years most residential users will be served by SS7 equipped local offices. Caller ID is not yet available on an interstate basis to residential subscribers. However, a form of the service is currently available in conjunction with interexchange carriers' (IXCs') 800 and 900 service offerings which allows businesses to identify incoming customer calls. This form of the service is based upon Automatic Number Identification (ANI) technology and functions quite differently from residential caller ID services.

4. *Interstate caller ID.* The availability of interstate caller ID service requires interconnection of the local exchange carriers' SS7 networks with interexchange carrier SS7 networks, so that the calling party's number can be transmitted from the originating end to the terminating end of the call. Effective nationwide caller ID will not be feasible, therefore, until SS7 interconnection has become fairly ubiquitous. This interconnection process is underway, technical issues are being addressed, and some of the Bell Operating Companies (BOCs) have filed SS7 interconnection tariffs at the Commission. At least some of the BOC tariffs propose to transmit the calling party's number to IXCs as part of the SS7 signalling data. Once SS7 interconnections are in place, interstate caller ID service will require agreement among the IXCs and the LECs regarding the transmission of caller ID data from one carrier to another. Specifically, while the LECs may pass the calling party's number to IXCs pursuant to SS7 interconnection tariffs, the IXCs are currently under no obligation to pass that data to the terminating LEC or end user.

[1] For example, Bell Canada has introduced a service called call management service. Available with call management service are certain features (Call Display and Call Return) that enable customers to identify a calling party's telephone number (caller ID).

5. *Interstate Automatic Number Identification (ANI).* ANI is a service similar to but distinct from caller ID. ANI is the billing telephone number of the calling party. It is transmitted primarily on toll/access calls on the trunk side connection to the LEC's switch. ANI has traditionally been used by LECs and IXCs to identify telephone numbers for billing purposes. ANI was designed to provide IXCs the number to bill for transmission of an interstate call. Under current technology, and due to the very nature of its original intended purpose, ANI is not blockable in the same way as caller ID. ANI can be transmitted in-band (down the same wire path as the call) or it can be transmitted out-of-band (travels on a physically distinct path from the call) with SS7 trunking. The in-band signal is multi-frequency machine readable. The ANI information is transmitted before the dialed number. Because it precedes the call it can be used not only for billing purposes but also for routing calls to correct stations within an organization. ANI is available to IXCs and other subscribers from LECs through Feature Group D access service and Feature Group B over D access service. ANI is also available through IXCs in conjunction with 800 or 900 service. Businesses subscribing to interstate ANI service are utilizing ANI for such applications as: dealer location, to associate an incoming call with the dealer closest to the caller's location; alarm signalling, to associate an incoming call with the caller's address; data security, as a secondary means to restrict access to electronic information to calls emanating from particular numbers only; call redirection/routing capability, to transfer calls to employees handling particular geographic locations. ANI information can also be combined by the subscriber with a database of information associated with an incoming calling number. This application is used in customer service or order taking applications to match an incoming call instantly with billing information about that customer, such as account balance or prior purchases or transactions. Delivery of ANI today requires a dedicated line between the IXC and the business subscriber. This is because the ANI is transmitted directly to the subscriber of 800 or 900 service, bypassing the terminating local exchange carrier. Thus, although ANI appears on the surface to be a type of interstate caller ID service, it differs from caller ID in that it precedes the call by arriving at the called station before the first ring or simultaneous with the first ring, provides the billing rather than calling location number, is provided directly by the IXC only on calls that do not use a terminating LEC, and identification of ANI is not blockable by the calling party under current technology.

6. *State tariffed services.* States have taken different approaches to the offering of caller ID by LECs. These range from permitting the service without restriction, to requiring certain calling number identification "blocking" options, to prohibiting it. The information before us as of August 1991 suggests that five states have caller ID tariffs in effect with no blocking requirements.[2] Eight states and the District of Columbia have caller ID tariffs in effect with blocking requirements.[3] Five states have approved caller ID tariffs on a trial basis.[4] One state has a caller ID tariff pending.[5] Three states suspended Caller ID tariffs or have tariffs on appeal.[6] One state court has found caller service to be illegal.[7] Seven states are conducting general studies of the service.[8] Six state legislatures have enacted legislation or are considering such a course of action.[9]

7. Scope of the NPRM. A petition for rulemaking (petition) was filed by Joseph Baer regarding the establishment of an interstate calling number identification service (caller ID).[10] The petition proposed a national calling number delivery service that would incorporate, *inter alia*, alphanumeric alternate identities as a measure to protect the privacy of calling parties whose numbers are not published in directories. The petition proposes a new rule requiring all common carriers, in connection with any interstate or foreign telephone conversation, to make available to any non-business telephone subscriber who has taken telephone service on an unlisted basis the means, at reasonable charges, of substituting a confidentially registered alphanumeric designation for the billing number on a call-by-call basis. For the reasons discussed below, we deny the petition but initiate a Notice of Proposed Rule Making (NPRM) to establish a federal model for caller ID services. In order to establish an environment in which interstate caller ID services are made possible and later retrofitting of telephone company facilities is avoided, we tentatively conclude that it is necessary to establish a federal model for the offering of interstate caller ID service. We must consider: interstate caller ID, ANI, and intrastate caller ID. This NPRM establishes

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[2] New Jersey, Tennessee, Vermont, Virginia, West Virginia.

[3] Maryland, Washington, D.C., Nevada, Alabama, Indiana, Florida, Delaware, California and Kentucky. Generally, the blocking required by these states requires that customers be allowed, without charge, to block calls on a per call basis, generally by dialing *67 before dialing the called number. Nevada approved a tariff pending filing of an amendment adding blocking. California, which requires free per-call blocking by law, is considering legislation that would require a per-line blocking option.

[4] Colorado, Nebraska, New York, Georgia and North Dakota.

[5] Illinois.

[6] Ohio, South Carolina, and North Carolina.

[7] Case now pending before the Pennsylvania Supreme Court.

[8] California, Colorado, Idaho, Iowa, New York, Washington, and Texas. The New York Public Service Commission has rejected Caller ID tariffs filed by Rochester Telephone Co. and New York Telephone Co. "because they included only one option for blocking the display of the calling party's number -- per call blocking." The New York PSC determined that per-line blocking also should be offered, but it did not say whether this option should be free or provided for a small charge.

[9] California has enacted legislation. Pennsylvania, Michigan, New Jersey and Virginia have bills pending which would require the availability of blocking. Wisconsin is conducting a legislative investigation.

[10] *See* FCC Report No. 1817, released June 18, 1990. Comments were filed by: Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), Central Telephone Company (Centel), Direct Marketing Association (DMA), GTE Service Corporation (GTE), MCI Telecommunications Corporation (MCI), National Telephone Cooperative Association (NTCA), Nynex Telephone Companies (Nynex), Pacific Companies (Pacific), Dr. Michael Trahos (Trahos), Southwestern Bell Telephone Company (SWB), and United States Telephone Association (USTA). Reply Comments were filed by: Joseph Baer, People of the State of California and the Public Utilities Commission of California (California), North Carolina Department of Justice (N. C. DOJ), MCI, Trahos, and US West Communications (US West).

tentative Commission policy regarding each of these individual services and seeks information on the establishment of a federal standard for interstate services.

II. DISCUSSION

A. INTERSTATE CALLER ID

8. As discussed at para. 3, *supra*, the technology to make possible a nationwide caller ID service is already being put in place. Interstate caller ID would enhance the value of the service to intrastate subscribers and augment the available choices of existing interstate services to all subscribers. The ability to choose caller ID and other services based on access to caller ID information should be available to interstate subscribers nationally. The evidence before us indicates that several regulatory and legal issues may delay the introduction of interstate caller ID. The Commission proposes to address these issues in the context of this NPRM to establish a national model for delivery of interstate caller ID service.

9. Numerous comments were filed in response to the rulemaking petition that address interstate caller ID and ANI issues. Rochester proposes an interstate caller ID framework whereby the calling party number shall be passed to the interstate called party to the extent technically feasible in a carrier's network without significant additional investment, unless the calling number is blocked by the calling party. Rochester further proposes that LECs shall provide calling parties the capability, by dialing an additional code on each call, to block the transmission of the calling number. Rochester also proposes that neither LECs nor IXCs shall provide calling parties a capability to block transmission of the calling number automatically on all interstate calls from a given subscriber line (per line blocking).[11] GTE agrees that caller ID should be available on virtually all calls.[12] Pacific states that for issues which involve more than one carrier, such as interstate caller ID, the telephone industry should be permitted to continue to work together to ensure that mutually agreeable solutions and accommodations meet the telecommunication and privacy preferences of their customers.[13] SWB reports that an SS7 protocol has been developed and agreed upon by industry standards bodies to pass various parameters, including the calling party number.[14] SWB argues that uniformity is necessary and desirable with regard to one aspect of calling number delivery, namely the assurance the calling number delivery protective measure (call blocking) adopted in one jurisdiction is honored in all other jurisdictions. SWB suggests that the terminating carrier should honor privacy instructions whether or not the same system is available to subscribers in its jurisdiction. SWB also suggests that short of preemption, a joint conference of federal and state authorities could be created pursuant to section 410(b) of the Communications Act of 1934, as amended, 47 U.S.C. 705.[15] MCI states that it receives ANI from the LEC of the calling party and uses it for billing purposes. MCI states it does not continue to forward ANI information to the terminating exchange carrier and does not intend to do so routinely in the future. MCI urges the FCC not to premise any rule on such an assumption. MCI states that passing of ANI to a terminal location controlled by a BOC would violate restrictions on BOCs against the provision of interstate service if that BOC were to sell the ANI to a subscriber either on a per-call basis or through an embedded charge for exchange service.[16] MCI also states that the FCC should consider the potential operational difficulties presented by differing state regulation in the area of calling number information. MCI states that differing rules create a risk that the IXCs may be required to conform their operations to numerous different and perhaps conflicting sets of rules for what information is forwarded by the originating exchange carrier.[17] MCI asserts the FCC may wish to consider whether to adopt a single set of operational standards dictating the format and coding of calling number information for interstate telephone traffic.[18] Bell Atlantic states that it is looking to expand connectivity with independent telephone companies and IXCs for delivery of interstate caller ID. AT&T states that it has not reached any business agreements with the LECs on how interstate caller ID will be handled. AT&T further states that questions remain such as will joint partnerships be necessary, and how will costs be allocated? AT&T surmises the business contracts will take longer to develop than the technology.

11. We tentatively conclude that interstate caller ID is in the public interest and that we should adopt a national policy on interstate caller ID in order to remove undesirable barriers to the efficient entry of the service into the marketplace. As we noted earlier, the potential benefits of the underlying technology are only beginning to be realized. A national policy must incorporate Commission policy on privacy considerations (*see* paras. 13-20, *infra*), while at the same time ensuring that a uniform national method of delivery of caller ID is established on an interstate basis. The Commission initiates this NPRM to establish a forum to resolve the legal, financial and technical issues implicated by the delivery of an interstate caller ID service. Once interstate policy is established, mechanisms for coordinating federal policy with state policy can be assessed. The Commission seeks detailed comments on the extent of the progress among carriers to establish joint provisioning of service, and any impediments which have been identified.

12. *Transmission of Calling Party Number.* The transmission of the calling party number by the LEC to the IXC is an essential element of interstate caller ID. The Commission tentatively concludes that LECs should be required to provide the calling party's number to IXCs as soon as technologically feasible. Delivery of the calling party's number to any terminating LEC is an equally essential element to interstate caller ID. Therefore, the Commission proposes that IXCs should be required to transmit the calling party number to the terminating LEC as soon as technologically feasible. Such requirements are in the public interest in that they assure the physical transmis-

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[11] Rochester Comments at 7.
[12] GTE Comments at 1-2.
[13] Pacific Comments at 4.
[14] SWB Comments at 2.
[15] SWB Comments at 7.
[16] MCI Comments 1-2.
[17] *Id.* at 3.
[18] *Id.*

sion of the calling party number on all interstate calls in a uniform manner. The Commission notes that several carriers have already filed SS7 interstate access tariffs which include calling party number delivery as a component of access service. The physical transmission of the calling number alone, however, does not resolve issues regarding the division of costs and revenues in providing the service. We turn now to these considerations.

13. *Costs of Interstate Caller ID.* Our initial view is that the cost of caller ID service, including the cost of any privacy protection mechanisms, should be absorbed by those who use the service. Three carriers may be involved in an interstate caller ID call: the originating LEC, the IXC, and the terminating LEC. We believe that, because the called party receives the value of the calling number, it should bear the cost of the service. We seek comment on the feasibility of this approach, and on which carrier or carriers the called party should compensate for receipt of the desired information. It could be difficult to implement a system whereby the called party pays the IXC directly for interstate caller ID information because the interstate called party may receive calls via a large number of IXCs, not of its own choosing and with whom it has no relationship. We also ask for comment on whether costs incurred when a calling party activates a privacy indicator (call blocking mechanism) should be borne by the calling party. The Commission invites proposals for the resolution of the cost/revenue sharing issue in the provisioning of interstate caller ID. We also ask for comment on how the costs of caller ID should be identified and allocated. Finally, the Commission seeks comment on the technological capabilities and limitations of the telecommunications networks in the context of any proposed interstate caller ID billing system.

B. PRIVACY.

14. *Introduction.* Caller ID services involve at least two competing privacy interests. First, the called party may desire to know who is calling before answering. Second, the caller may have a desire not to reveal the calling number. Thus, caller ID services may, at times, put the called party's desire to identify the caller in conflict with the caller's desire for anonymity. We tentatively conclude that the called party, especially in the residential setting, values highly privacy in determining whether or not to allow the caller to telephonically enter the premises. This has long been recognized in conjunction with obscene, prank or harassment calls and seems increasingly reflected in consumers' desires to have the opportunity to screen out unwanted and intrusive commercial calls. We also tentatively conclude that the caller may also have a need not to disclose the calling number under certain circumstances. Thus, it is necessary to balance the privacy interest of the called party against the privacy interest of the caller in formulating any federal policy or rule. Although the states have struck the balance in varying ways, and in some states callers have no privacy protection mechanisms, the Commission tentatively proposes that interstate caller ID service should provide some type of privacy protection mechanism. We believe that such a balancing of the privacy interests in question adequately protects the needs of the called party, ensures the viability of the service overall, and establishes a mechanism for the protection of the calling public with legitimate privacy needs such as health and safety concerns. The Commission seeks detailed analysis on whether the privacy interests in question are matters of public policy or constitutional in nature and the significance, if any, of this determination. The Commission requests commenters to identify the nature of and the extent of any privacy right of either the calling or the called party. Analysis of this issue should give proper weight to the called parties' desire to identify the caller.

15. *Societal Privacy Interests.* Caller ID service now makes it possible for called parties to "see who is knocking" before answering a call. This ability makes it possible for called parties to exercise privacy rights heretofore unrecognized due to the limitations of technology. The problem of the obscene or harassing caller has been addressed by most state legislatures and the federal government. The limitations of the network have made it possible for callers to place calls with complete anonymity, often with impunity. The technology is now at hand to deter such calls. We tentatively conclude that caller ID is a valuable service to the consumer, and that any regulatory response to the privacy interest of the calling party therefore should take into account the public benefits of caller ID service and should not undermine the value of the service overall.

16. Comments on Privacy. Comments on the rulemaking petition express a variety of views on the privacy issue. Centel argues that the petition's approach that only subscribers to nonpublished service should have the capability to use an alternate identity as a calling number, recognizes only the right of called parties to identify callers but ignores the absence of a right to place calls anonymously.[19] GTE suggests that caller ID is not so deeply personal as to warrant the repression of telecommunications technology.[20] Nevertheless, GTE states that the Commission should weigh all alternatives to address privacy and that any solutions must be in the public interest and technically practical.[21] BellSouth states that the called party has an inherent right to know the caller's identity and that this right is not subject to adequate protection of the calling party's privacy.[22] Nynex believes that reasonable means can be developed to protect the legitimate privacy interests of the calling and called parties, but that total anonymity does not fall within the constitutionally protected privacy interests of calling parties.[23] Pacific believes that as a regulated service provider, it must consider the privacy needs of both the calling and called parties. Pacific's response to privacy expectations is per call blocking of number identification.[24]

17. Ameritech supports unrestricted caller ID, stating that no one has a legitimately protectable interest in remaining anonymous while calling another person.[25] Ameritech reasons that disclosure of the calling party

[19] Centel Comments 8-9.
[20] GTE Comments at 6.
[21] *Id.* at 7.
[22] BellSouth Comments at 6.
[23] Nynex Comments at 2.
[24] Pacific Comments at 4.
[25] Ameritech Comments at 2.

number is not to the world at large but only to the called party; Ameritech suggests that if callers feel uncomfortable, they can always place the call from a pay telephone.[26] Dr. Michael Trahos reports that the medical community in northern Virginia, where unrestricted caller ID is available, is "outraged" about the service because it inhibits people from calling medical personnel.[27] He states that various medical and law enforcement organizations have passed resolutions to support federal and state legislation that requires caller ID blocking be made available to telephone subscribers on a cost-free basis.[28] The N.C. DOJ states that, as a matter of policy, not providing for legitimate privacy interests is inappropriate, incorrect and highly disruptive of normal social interchanges.[29] US West has determined to allow any subscriber, business or residential, to block the delivery of the phone number, published or unpublished.[30]

18. The Commission tentatively concludes that caller ID is a service that should help protect the privacy concerns of the called party and that, through a reasonable blocking mechanism, it should recognize the calling party's privacy concerns. In the vast number of calls to one's own business, family, associates, or acquaintances, identification of the calling number is of little consequence to the calling party and can be a valuable service to the called party. Any regulatory approach to the question of privacy which unduly increases the number of calls that do not communicate the calling party number, undermines the value of the service overall and may effectively eliminate its value to the public. Easy blocking might well lead to the least wanted calls utilizing such a capability. The record, however, demonstrates support for the premise that only some callers, such as law enforcement personnel, counseling professionals and residents of domestic violence shelters, have a legitimate need not to disclose the calling number. For example, the North Carolina State Bureau of Investigation states that unrestricted caller ID would be a major hindrance to law enforcement investigations, particularly those involving illegal drug activities. It further states that if only law enforcement utilized the option to block, then that in itself would be a clear indication to the criminal of who is calling.[31] The Virginia Osteopathic Medical Association has passed a resolution stating that the electronic transmission of private/unlisted telephone numbers of physicians and surgeons can inhibit a physician's ability to perform his/her medical duties; the association expresses support for all state and federal legislation that requires telephone companies to provide caller ID blocking on a cost free basis.[32] Thus, it appears that the calling public may have an interest in exercising a measure of control over the dissemination of their telephone numbers. We tentatively conclude that a regulatory framework for interstate caller ID service should include some type of privacy protection mechanism. We ask for comments on this tentative conclusion, including detailed analysis and proposals on the definition and the scope of the need for blocking options. We also ask whether the same expectation should be accorded all callers, commercial or residential. As was noted above, several states apparently do not require telephone companies to offer a way to block identification of the calling number. We are especially interested in the experience of those states. Have medical, law enforcement and other social services been disrupted? Have consumers complained of an inability to block calls to businesses? We also ask for information about the frequency with which callers invoke blocking in those states permitting blocking. The Commission further asks whether any privacy protection regulatory framework should recognize exceptions for instances when a very limited expectation of privacy attaches to the communication, such as caller ID systems used solely in connection with calls within the same limited system, including (but not limited to) a Centrex, virtual private network, or private branch exchange system, emergency services, and a caller ID service provided in connection with legally authorized call tracing or trapping procedures specifically requested by a law enforcement agency.

19. *Constitutional Privacy Considerations.* No party commenting on the rulemaking petition that suggests there is a federal constitutional right to privacy attached to caller ID services identified specific language in the U.S. Constitution or case law to support this premise. Although several federal statutes recognize and regulate government and private access to privately held personal information,[33] these rights are statutory rather than constitutional in nature. We seek comment on whether there is an identifiable federal constitutional privacy interest which permeates the offering of caller ID services. We ask whether this privacy interest, if it exists, should be protected in the same manner for caller ID and ANI and related services.

20. *Technical Measures to Protect Privacy.* Having tentatively concluded that, as a matter of policy, non-disclosure of the calling number is in the public interest under some circumstances, we now turn to an analysis of the methods available to bar disclosure of the calling number. The two methods most often deployed in intrastate caller ID service are per call and per line blocking. The per line blocking option bars disclosure of the calling number automatically for all calls emanating from a particular subscriber line. We tentatively conclude that the per line automatic blocking option unduly burdens the effectiveness of the service overall by failing to limit its applicability to those calling circumstances where privacy is important to the calling party. For example, in the case of

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[26] *Id.*

[27] Trahos Comments at 10.

[28] *Id.*

[29] N.C. DOJ Reply Comments at 2, accompanied by numerous letters from domestic violence shelters, medical hot lines and private citizens opposed to unrestricted caller ID.

[30] US West Reply Comments at 4.

[31] N.C. DOJ Reply Comments attached letter dated February 16, 1990 from the North Carolina State Bureau of Investigation Department of Justice to Honorable Lacy H. Thornburg, North Carolina Attorney General. Similarly, the North Carolina Health Department states that disease control program professionals call people regarding exposure to communicable diseases. The health department states that caller ID service threatens their ability to make these contacts, stop communicable disease transmission, and maintain legally-mandated confidentiality. *Id.* at letter dated February 26, 1991 from the North Carolina Department of Environment, Health, and Natural Resources to the North Carolina Utilities Commission.

[32] Trahos comment at appendix C.

[33] *See, e.g.,* Fair Credit Reporting Act, 15 U.S.C. § 1681, Right to Financial Privacy Act, 12 U.S.C. § 3401, Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g), and the Privacy Provisions of the Communications Act of 1934, 47 U.S.C. 705.

law enforcement personnel, there may be a need to maintain calling number privacy on some calls, but that same line may be used to telephone other law enforcement personnel, victims of crime, cooperative witnesses, and/or family or friends. In these types of calls, calling number privacy is not needed and calling number identification can actually be a valuable piece of information for both the caller and called party. Per line blocking would undercut the usefulness of caller ID. To a lesser degree, per call blocking will dilute the usefulness of caller ID. For example, the per call blocking option could allow the obscene or harassing caller to continue criminal activity with impunity. In addition, the greater the number of calls placed using per call blocking, the less effective and valuable caller ID service is overall. On the other hand, a per call blocking option should recognize the calling party's privacy concerns. The Commission seeks comment analyzing the relative merits, technical feasibility and foreseeable costs to carriers and customers of establishing a requirement that interstate caller ID services incorporate a per call blocking option. The Commission seeks comment on whether the per call blocking option should be operator assisted or automatic and on whether it is appropriate to charge the calling party for blocking.[34]

21. We are also interested in knowing whether blocking mechanisms jeopardize other policies such as calling party identification by emergency services (911). The Commission seeks comments on the relationship of such blocking mechanisms to state mandated restrictions on caller ID services. Specifically, we ask whether interstate blocking systems can be implemented side by side with state restrictions which may be similar to or different from the interstate blocking system.[35] We are interested in knowing whether mechanisms other than per call, per line, or operator assisted blocking are available to assure legitimate calling party privacy interests. The Commission asks whether intervention by an operator for that limited number of privacy calls is more cost effective and efficient than other blocking alternatives? In states using per call, per line, or both blocking technologies, what percent of callers utilize blocking? We especially welcome empirical data on the costs and benefits of the various approaches.

22. The rulemaking petition proposed that subscribers to non-published services be provided the capability to activate an alphanumeric alternate identification number as a means to block the identification of the calling number.[36] Most commenters argued that current technology does not support this proposal and, at a minimum, extensive modification to the current SS7 architecture would be required.[37] Other, less costly alternatives to the petitioner's proposal appear to protect adequately the privacy expectation of calling parties. Nothing in the record suggests that the petition's technological approach would more adequately protect privacy or be less costly. We reject the petition's alternate identity proposal because of our belief that other less costly yet effective regulatory and technological approaches are at hand to address privacy needs.

C. SUBSCRIBER EDUCATION.

23. The Commission notes that regardless of the scope of the privacy interest in question and the regulatory mechanism to address the issue, the public interest requires that subscribers be made aware when caller identification services become available on an interstate basis and called parties are able to identify their calling number. No segment of the calling public can adequately control dissemination of the calling number under any regulatory structure if they are unaware that their calling number is being identified. Carriers offering interstate caller ID service, or facilitating transmission of interstate caller ID, should be required to inform callers of the availability of the service, including instructions to callers regarding how to implement any caller privacy mechanisms. We ask what, if any, other consumer education measures should be imposed. We seek comment on whether this education requirement should fall upon local exchange carriers or interexchange carriers or both. We seek specific proposals on how these education efforts can be best effectuated, and ask parties to include cost estimates with their proposals.

D. LEGALITY OF CALLER ID.

24. Several commenters have suggested that caller ID services may violate the Federal Wiretap Act, 18 U.S.C. 3121 3127, state statutes, or privacy provisions of state constitutions. For example, the State Attorney General of North Carolina has submitted its opinion to the North Carolina Utilities Commission indicating that caller ID violates North Carolina and U.S. trap and trace statutes.[38] Section 3121 of Title 18 of the U.S. Code provides that:

> [n]o person may install or use a pen register or a trap and trace device without first obtaining a court order.

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[34] *See, e.g.* the state of Virginia where unrestricted intrastate caller ID service is available with operator assisted privacy calls available to address specific privacy needs. The Canadian Radio-Television and Telecommunications Commission has also directed Bell Canada to provide for the blocking of caller ID by means of a local operator-assisted dialing service; operator-assisted caller ID blocking is available at a charge of 75 cents per call.

[35] For example, would it be feasible to adopt a federal policy requiring a per call blocking option for interstate caller ID, while honoring any other blocking that states have decided to permit?

[36] The Petition proposes that in order to balance the calling and called parties' privacy rights, subscribers with unlisted numbers should be able to be identified by means other than their directory numbers. The Petition explains that the alternate identity of a calling party's line should consist of the area code, followed by up to 20 alphanumeric characters chosen by the subscriber and found, by the responsible exchange carrier, to be unambiguous. Petitioner suggests business lines should not be afforded this facility for alternate identities. Petition at 3-4.

[37] *See, e.g.*, Rochester Comments at 5, GTE Comments at 7, BellSouth Comments at 8, Nynex Comments at 7, Pacific Comments at 7, SWB Comments at 2, USTA Comments at 4, Ameritech Comments at 4, Bell Atlantic Comments at 6.

[38] *See, e.g.*, Reply Comments of North Carolina Department of Justice at 2, Trahos Comments at 6.

18 U.S.C. § 3121. The title further states, however, that this prohibition does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service:

> (1) relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service;
>
> (2) to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or
>
> (3) where the consent of the user of that service has been obtained.

18 U.S.C. § 3121(b)(1), (2), and (3).

25. Similarly, the Electronic Communications Privacy Act of 1986 prohibits the interception and disclosure of wire, oral, or electronic communications.[39] It also prohibits manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices.[40] Section 2511(1)(d) states:

> [I]t shall not be unlawful ... to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception.... 18 U.S.C. § 2511(1) d).

In this regard, we will be formally soliciting the views and analysis of the U.S. Department of Justice.

26. In adopting federal wiretap provisions, Congress also indicated that more restrictive state laws were not precluded by federal law.[41] Although to date no state has directly prohibited interstate caller ID service, we request analysis of whether state actions regarding the legality of caller ID offerings would impede the development of the service on an interstate basis, and, if so, whether the Commission has authority to preempt such state actions. We will also solicit the views of the Department of Justice on this issue, as well as whether the federal wiretap statutes are relevant. *See* paras. 28-32, *infra*. Although the North Carolina Attorney General has filed its opinion with the North Carolina Utilities Commission, the state of North Carolina has not issued a final decision on the legality of the service. Similarly, although a Pennsylvania state court has found the service to be illegal under that state's wiretap laws, the case is on appeal to the Pennsylvania Supreme Court.

E. ACCESS TO THE CALLING NUMBER VIA ANI.

27. As discussed at para. 4 *supra*, subscribers to 800, 900, or local exchange access service sometimes also receive the ANI associated with a call. This is a distinct offering from caller ID service in that it is not blockable in the same ways as caller ID and, because there is a dedicated line between the IXC and the called party, it does not involve a terminating LEC in delivering the ANI to the called party; ANI also delivers the billing as opposed to the calling number and may be delivered to the called party simultaneously with the first ring.[42] The petition proposes that availability of ANI (and features serving the same purpose in SS7 and ISDN) should be restricted to LECs and IXCs, for the purposes of call set-up, call management, billing and maintenance.[43] The petition suggests that all parties other than carriers who wish to identify the calling party can be offered caller ID, under tariff where tariff regulation obtains, for any applications which entail delivery of the calling party's identity to the called party. The petition states that the calling party's number should be delivered in the same manner as ANI was previously. It adds that this will ensure continued compliance by the LECs and the IXCs with the FCC's requirements for Open Network Architecture, and minimize any network modifications which might become necessary.[44]

28. GTE states that in order to define the technical capabilities and uses of ANI, calling number delivery, and calling party number, the Information Industry Liaison Committee (IILC) -- an entity recognized by the FCC as an appropriate forum to address enhanced service provider/local exchange carrier issues -- undertook four separate projects related to these services. GTE asserts that a comprehensive list of the currently identified uses of calling party identity was generated and some technical issues related to delivery or control of the calling party identification analyzed. GTE supports the petition's proposal to separate tariff offerings for ANI and caller ID. GTE agrees that ANI should be available only to IXCs and LECS through access tariffs for call set-up, call management, billing and maintenance.[45] But GTE recognizes that when such restrictions are at odds with marketplace forces they should be eliminated in favor of such solutions as "alternate identity."[46] Similarly, Pacific Bell states that ANI is being used in ways never intended. It states that the FCC should inquire into misuse of ANI and that emerging technologies such as SS7 may provide opportunities for addressing ANI abuse.[47] The DMA states that:

> [b]ecause of the direct marketing industry's long history of supporting the opportunity of consumers to limit the unwanted dissemination of information about themselves, the DMA intends to support those legislative or regulatory efforts that require suppliers

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[39] 18 U.S.C. § 2511.

[40] 18 U.S.C. § 2512.

[41] *See, e.g., United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 402 U.S. 990 (1975); S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968).

[42] In most applications the billing number and the calling party number is the same number. However, in many instances, especially in the business setting, many calling numbers can be associated with a single billing number.

[43] Petition at 10.

[44] *Id.*

[45] GTE Comments at 10.

[46] GTE Comments at 12.

[47] Pacific Comments at 9-10.

of ANI and similar services to offer consumers the option of blocking the receipt of the ANI signal by commercial users.

DMA Comments at 3. US West states that while a LEC might choose to allow customer choice with regard to caller ID and provide, through existing software, a per call blocking option, if the called party subscriber were subscribing to ANI delivery service rather than a local caller ID service, the calling customer's choice would be negated. US West adds that, whether the economic considerations would support technologically "marking" ANI, as can be done with calling number identification, is extremely dubious. US West suggests a joint conference, pursuant to Section 410(b) of the Communications Act, to address this issue.[48] ANI is becoming increasingly available to non-carrier subscribers to interstate services via SS7 access tariffs. Although the service is technologically distinct from caller ID service, the impact upon the calling party is the same -- identification of a number associated with the calling party. The Commission tentatively concludes that it is not feasible to implement blocking of ANI at the will of the calling party. ANI is indispensable to carriers for call billing and maintenance. Although it may be possible for IXCs not to transmit ANI to the end user, the calling party should not have an ability to block the IXC from receiving ANI for billing purposes. The Commission seeks comment on privacy considerations associated with ANI service subscribers. Given that ANI service subscribers are generally 800 service subscribers, 900 subscribers, or information service providers, it is necessary to analyze whether the privacy concerns are the same for calls placed in this commercial setting. While in some ways a caller's expectation of privacy may be reduced in a business setting, in other ways privacy concerns may increase as telephone numbers become widely disseminated beyond the business originally called, and are used as a means of telephonically intruding into a customer's home. Commenters should also address the issue of whether the privacy interests are affected by the fact that in a call to an 800 service subscriber, the called party is paying for the call. In addition, 800 service subscribers have traditionally received information on the telephone numbers associated with incoming calls for billing purposes. The call is in a sense a "collect call" and it is necessary to consider this element in weighing any privacy interest associated with 800 service. In the case of 900 service, the caller is indeed paying for the call in the sense that cost of the call to the caller is ultimately based on the cost of transmission plus a premium for whatever information service is offered. In calls placed to information service providers the calling party may be paying for transmission service separately from payment for the value of the information received. Calls to information services thus may be more similar to calls placed to 900 service than calls to 800 service numbers. The Commission asks whether there are privacy interests associated with the transmission of ANI to 800 and 900 service subscribers and/or information service providers, and, if so, what approaches should be considered to address the issue.[49]

F. COORDINATION BETWEEN INTRASTATE AND INTERSTATE CALLER ID SERVICES.

30. We do not propose to preempt any specific state regulation governing intrastate caller ID services. However, in order to facilitate the development of interstate caller ID services, it is necessary to review existing state policies, and determine whether it is necessary or appropriate to preempt any such state policies. We are concerned that state requirements vary significantly enough to render interstate caller ID impractical and some may act to prevent such service directly. The Commission seeks comment on whether it is possible for intrastate and interstate caller ID regulatory systems to coexist.[50] We also ask whether, even if interstate and intrastate systems can coexist technologically, it is in the public interest to have dual systems, or does the level of confusion to the calling public necessitate uniform national caller ID policies?

31. In the context of analyzing the impact of state regulated caller ID systems on interstate services, it appears that some state decisions already have begun directly to impede the development of interstate services. In *Barasch v. Pennsylvania Public Utility Commission, et. al.* decided May 30, 1990,[51] a Pennsylvania court relied on its laws and state constitution to declare that caller ID service, even with per call blocking, is violative of both the state wiretap statute and the privacy provisions of the state constitution. On February 8, 1991, Bell Atlantic filed at the FCC Transmittal No. 410 to provide out-of-band signalling via interconnection with its SS7 network as a local transport, nonchargeable optional feature with Feature Group D service. As a direct consequence of the Pennsylvania court decision, Bell Atlantic will make caller ID information available to IXCs in all states of Bell Atlantic's region except Pennsylvania. Bell Atlantic states that it does not want to offer caller ID to IXCs in Pennsylvania while the Pennsylvania Supreme Court is reviewing the legality of caller ID under state law.[52] California has enacted state law defining privacy rights for calling parties in California, and requiring companies offering caller ID to provide free blocking services to callers. California states that AT&T has informally assured it that it will comply with California's privacy rules on an interstate as well as intrastate basis. California states it would hope to obtain similar assurances from other IXCs.[53] Pacific Bell states in its SS7 access tariff filed at the Commission that its calling party number optional feature of the tariff will not be available because it is not expected that the privacy issues raised by that network capability will be resolved by the California Public Utilities Commission

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[48] US West Reply Comments at 12-15.

[49] One possible approach would be to require businesses to obtain the consent of the caller before revealing the caller's telephone number to any third party.

[50] *See also* para. 18, *supra*.

[51] No. 2270 C.D. 1989 in the Commonwealth Court of Pennsylvania, Petition for Allowance of Appeal filed on August 14, 1990 in *Bell of Pennsylvania v. Pennsylvania Public Utility Commission*, in the Supreme Court of Pennsylvania.

[52] Bell Atlantic Tariff F.C.C. No. 1, 6th revised page 177, n. +, 6th revised page 189.1, 1st revised page 262.1, issued Apr. 11, 1991.

[53] Reply Comments of California at 4.

until first quarter 1992. Pacific Bell states that in order to minimize end user customer confusion, it will temporarily restrict the passage of calling party number.

33. The N.C. DOJ has issued an opinion stating that caller ID service violates both North Carolina's wiretap statute and the Federal Wiretap Act, 18 U.S.C. § 3121-3127[54] The Texas Office of Public Utility Counsel and the Office of the Attorney General of Texas have requested that the Public Service Commission initiate and conduct public hearings concerning both caller ID and delivery of interstate ANI. Texas also is considering legislation requiring all lines to be blocked from identification of the calling number on all outgoing calls those wishing their numbers to be identified would request unblocking in writing. This approach has the potential of impeding development of interstate caller ID. In addition, it appears that states considering caller ID proposals have not specifically distinguished the impact, either technologically or practically, their decisions could have on interstate as opposed to intrastate offerings.[55]

34. The Commission notes that the National Association of Regulatory Utilities Commissioners has adopted a resolution opposing any legislation that preempts state regulators' powers and duties to determine regulatory policy for intrastate caller ID service. Several commenters opposed to technological solutions suggested by the petition nevertheless advocate uniform national rules to facilitate development of the service and avoid stranded investment.[56] Their concern is that substantial retrofitting of equipment and software may be necessary to comply with uncoordinated federal and state policies. The NPRM adopted today is meant to develop a framework whereby consumers nationwide have available caller ID services on an interstate basis. The Commission seeks to determine whether state policies concerning caller ID negate and hinder the development of interstate caller ID, and/or ANI based interstate services. We also seek comment on whether, in light of the congressional determination in the federal wiretap statute not to preclude more restrictive state requirements, the Commission has and should exercise its authority to preempt such state requirements on communications policy grounds.

III. CONCLUSION

35. The Commission's goal in this proceeding is to establish federal policy to govern interstate caller ID services. This will aid the efforts of carriers, standards setting bodies, states, customer premises equipment manufacturers and others in providing the service in an efficient manner. The record is clear that unless the issues identified above are addressed in a coordinated way, the public may be denied access to a useful service many find valuable. We seek to avoid unnecessary expenditures and stranded investments that may result from the lack of a national framework for these services if subsequent retrofitting were necessary. Our initial view of the services which need to be coordinated within this federal model isinterstate caller ID, interstate ANI, and intrastate caller ID service. We tentatively conclude that this Commission should establish a federal model for interstate caller ID; that the federal model should recognize privacy interests of both the called and the calling party; that it should do so efficiently and without interfering with other valuable services (such as 911); that the costs of the service should be recovered from the beneficiaries, the users of the service; and that carriers should pass on the calling party number from the originating carrier to the terminating carrier. We tentatively conclude that it is not necessary at this time to propose to preempt any intrastate caller ID offerings. We seek to analyze fully whether interstate and intrastate models may coexist harmoniously both legally and technologically.

IV. OTHER MATTERS

36. This is a nonrestricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

37. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA, on which written public comments are requested, is set forth in Appendix A. Those comments must be filed in accordance with the same filing deadlines as comments on the NPRM, but they must have a separate and distinct heading which designates them as responses to the Initial Regulatory Flexibility Analysis.

38. The Secretary shall send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

39. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **January 6, 1992** and reply comments on or before **February 5, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

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[54] N.C. DOJ Comments at 2.

[55] The states of New Jersey, Virginia, West Virginia, South Carolina, and Tennessee, have approved caller ID delivery systems without any blocking option for most subscribers. The technology of such systems therefore may not be designed to recognize and implement any blocking command associated with a call. This could essentially defeat any interstate policy regarding calling party privacy.

[56] *See* Comments of: Rochester at 7-8, Centel Comments at 10, GTE Comments at 7, SWB at 7, DMA at 1, Trahos at 6, MCI at 3; *see* Reply Comments of: MCI at 2, Trahos at 7, US West at 15.

V. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED THAT pursuant to Sections 1, 4, 201-205, 218, 220, 405, and 412, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, 405, 412, 522 and 533; and 5 U.S.C. § 553, NOTICE OF PROPOSED RULEMAKING is hereby provided as indicated above.

41. IT IS FURTHER ORDERED THAT the petition filed by Joseph Baer IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reasons for Action:

This rulemaking proceeding is initiated to obtain comment on whether the Commission's express goal in this proceeding, as set forth in paragraph 6, *supra*, should lead it to adopt rules which provide for uniform national policies for interstate calling party number delivery.

Objectives:

The Commission seeks to establish an environment in which interstate caller ID services are made possible and stranded investment is minimized.

Legal Basis:

The proposed action is authorized under Sections 1, 4, 201-205, 218, 220, 405, and 412, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, 405, 412, 522 and 533; and 5 U.S.C. § 553.

Reporting, Recordkeeping and other Compliance Requirements:

This Notice proposes that originating local exchange and interexchange carriers be required to pass on the calling party number to terminating local exchange carriers, if any, or to end users. The Notice also seeks comment on regulatory mechanisms to balance the privacy considerations of both the calling and called party.

Federal Rules which Overlap, Duplicate or Conflict with these Rules:

None.

Description, Potential Impact, and Number of Small Entities Involved:

Rule revisions in this proceeding could affect carrier's offering of interstate caller ID service. After evaluating the comments and reply comments in this proceeding, the Commission will examine further the impact of any rule changes on small entities, and will set forth its findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

The NPRM solicits comments on any significant alternatives minimizing the impact on small entities consistent with the stated objectives.

Separate Statement
of
Commissioner Ervin S. Duggan

In re: Rules and Policies Regarding Calling Number Identification Service (CC Docket No. 91-281).

I support the Commission's decision to begin a rulemaking to develop a federal policy for calling number identification services--- both caller ID and its analogue in the 800 and 900 services, automatic number identification (ANI). I write separately to highlight several questions that I hope the parties will address as they consider the privacy issues that arise from transmitting a caller's telephone number.

Unquestionably caller ID implicates significant privacy interests for both calling and called parties, although the called party's privacy interest is easier at first blush to comprehend. People want an "electronic peephole"--- to know who is calling; to choose whether to answer--- and this privacy interest seems to me worthy of protection. Most people also recognize that there are obvious situations in which a caller may want and deserve to remain anonymous. Some callers will need protection against domestic violence, for example, and some seeking sensitive medical information will desire anonymity.

Beyond these situations, I believe that we need to ask whether there may be a more general privacy interest: that of callers who, for whatever reasons, prefer not to reveal their telephone numbers, or callers who in specific situations may wish--- or need--- to be anonymous.

To use a mundane example, should we be able to call to inquire about a store's hours only at the risk of revealing our telephone numbers and thereby placing ourselves on the store's (or someone else's) telemarketing list? In this unintended fashion, Caller ID actually could increase the number of intrusive and unwelcome calls into the home. And through the use of reverse directories, businesses may use a caller's telephone number to obtain a person's name and address as well. We commonly think of caller ID as being useful in the context of calls made from a residence to another residence. Should calls by individuals to businesses, government agencies, or medical offices be made only at the expense of revealing one's telephone number?

Technology has made it possible for us to conduct more and more of our personal and business transactions over the telephone, from ordering catalog items to theater tickets, from banking transactions to travel arrangements. Interconnected computerized databases make it possible to accumulate vast stores of information about individuals--- information with prodigious commercial value, since marketing efforts are increasingly targeted to particular demographic and psychographic groups. These developments are not all bad. But they do mean that individuals may want and need some control over the nature of information that is known about them. Given this privacy interest, it may be wise policy to preserve a blocking option of some kind, and to extend it to 800 and 900 services. Another possibility would be to require businesses to obtain a customer's consent before disclosing a telephone number to others.

We need to consider also how privacy interests may be affected as we move to a world in which communications services become more personalized. Many people predict that as personal communications services come into being, every citizen may be assigned a permanent personal telephone number that will make us reachable anywhere, anytime.

There are tremendous advantages to such universal telephone accessibility. But we would do well to begin now to think about the ultimate implications of personal telephone numbers for privacy. When the social security system was conceived, many feared that social security numbers could become universal identifiers whose widespread use could threaten the privacy of individual citizens. For that reason, strict limits were placed on the use of social security numbers. If the personal telephone number should become such a universal identifier, it could be used to retrieve all sorts of information about individuals from innumerable computerized databases. The ability to protect against release of one's telephone number might take on a different character under such a scheme.

I do not wish to be an alarmist in raising these questions. Technology brings us marvels, and I like those marvels, most of them. We need to have care, however, that when such marvels, as a byproduct, pose a threat to privacy, we are not purblind. It seems to me wise in this case to do some worrying now in order to protect the public's interest in the future.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-54
Gen. Docket No. 80-113

In the Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting:

Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service

ORDER ON RECONSIDERATION

Adopted: September 26, 1991; Released: October 25, 1991

By the Commission; Commissioners Quello and Duggan issuing separate statements:

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I. INTRODUCTION

1. In the *Report and Order* in the above-captioned combined proceeding, 5 FCC Rcd 6410 (1990) (hereinafter cited as *Wireless Cable Order*), the Commission revised sections of Parts 1, 21, 43, 74 and 78 of the rules. The purpose of this rulemaking proceeding was to facilitate the provision of "wireless cable" service to the public, without jeopardizing the ability of ITFS to fulfill its primary purpose of providing educational programming for instructional use.[1] This *Order on Reconsideration* resolves thirteen petitions for reconsideration and/or clarification concerning the *Wireless Cable Order*.[2]

2. After reexamining the issues raised in these petitions, we agree that some modifications to our requirements are warranted. We also take this opportunity to clarify portions of the *Wireless Cable Order*. Other requests for reconsideration of our decision are denied.

II. DISCUSSION

A. *Protected Service Area*

3. (1) *Fifteen-mile service area.* A number of entities request that we expand the Multipoint Distribution Service (MDS) station's protected service area beyond the

[1] "Wireless cable" uses Multipoint Distribution Service (MDS) Channels 1 and 2 or 2A, Multichannel Multipoint Distribution Service (MMDS) E-group or F-group channels, or Operational Fixed Service (OFS) H-channels, or excess capacity in the Instructional Television Fixed Service (ITFS), or a combination of such channels, to distribute video entertainment programming. We will not restate the background of wireless cable here; interested parties should consult the *Wireless Cable Order*, 5 FCC Rcd at 6410. By use of the term "wireless cable," we do not intend to suggest that these services constitute "cable" service for statutory or regulatory purposes.

[2] A list of the parties filing petitions, an opposition, and replies is provided in Appendix A, together with abbreviated descriptions of joint parties used in citations and references hereinafter.

current 30-mile diameter.[3] Initially, the Commission adopted a definition of an MDS station's protected service area that, according to Microband," encourages more and closer spaced stations with moderate transmitter power rather than fewer, more widely spaced, stations with higher power." *First Report and Order, Amendment of Parts 21, 74 and 94 of the Commission's Rules and Regulations,* 98 FCC 2d 68, 87 (1984)(hereinafter cited as *ITFS and MDS Technical Rules Order).* In that rulemaking order, the Commission considered and rejected a larger protected service area boundary. *Id.* at 87-89.

4. In the *Wireless Cable Order,* we increased the maximum power level for MDS stations from 10 watts of transmitter output power to the equivalent of 100 watts of transmitter output power.[4] However, this rule change was adopted in order to improve transmissions to receivers within the protected service area of the MDS station, generally 15 miles from the transmitter, not for the purpose of extending the distance at which transmissions may be received.[5] We decided in the *Wireless Cable Order* not to increase the MDS station's protected service area beyond this 15-mile boundary nor to adopt an approach that would require a unique service area determination for each MDS station, but rather to retain the uniform fixed mileage boundary. 5 FCC Rcd at 6419-20.

5. We continue to believe that a 15-mile-radius protected service area for MDS stations best serves the public interest. An enlargement of the protected service area from 15 miles to, for example, 30 miles from MDS station "A" could foreclose competition from a newcomer station, MDS station "B", by reserving for station "A" its customers located 30 miles from A's transmitter. On reconsideration some petitioners were quite candid in acknowledging that their purpose in requesting an enlargement of the protected service area was to foreclose competition from a newcomer station.[6] We are not persuaded that the protected service area boundaries should be enlarged beyond the current boundaries, especially where doing so could foreclose opportunity for an MDS entity in adjacent communities. Moreover, petitioners seeking enlarged protected service areas have not explained how the problems described in the *Wireless Cable Order,* 5 FCC Rcd at 6419-20, and the *ITFS and MDS Technical Rules Order,* 98 FCC Rcd 2d at 87-120, would be addressed. These include the administrative burden of determining in each case the boundaries of each MDS station's protected service area and whether an enlarged service area would preclude new MDS stations. We believe that it is more appropriate to address unique or anomalous circumstances in waiver proceedings instead of enlarging each MDS station's protected service area in this general rulemaking proceeding.[7]

6. (2) *Line of Sight.* One petitioner also requests that we revise the definition of an MDS station's protected service area to exclude any area which is not within line-of-sight of the MDS transmitter. We reject this request because, contrary to current practice, for each MDS station there would have to be a unique determination made by the Commission's processing staff of whether, and the extent to which, such areas exist within the nominal protected service area. Moreover, in the *Wireless Cable Order,* we authorized operators to install signal boosters when line-of-sight is lacking between an MDS station's primary transmitter and a proposed receiver site, within its protected service area. It would be inconsistent with the reasons for permitting boosters to adopt a definition for protected service areas which would require repetitive redeterminations of a boundary each time an additional signal booster is installed. Therefore, we do not revise the definition of an MDS station's protected service area in the requested manner.

7. (3) *Protected Service Areas of Leased Channels.* Some ITFS and wireless cable parties object on reconsideration to the Commission's failure to protect ITFS licensees from harmful interference caused by "newcomer" ITFS applicants during any hours the ITFS licensee leases excess capacity for "wireless cable" operations.[8] These petitioners argue that contracts for leasing excess capacity for wireless cable operations often must be terminated "after the licensing of a "newcomer" ITFS station if that station causes harmful interference to a previously-authorized ITFS station leasing excess capacity. They claim that even the threat that a "newcomer" ITFS station may be licensed thus precludes many ITFS licensees from leasing excess capacity. These petitioners further complain that our rules allow harmful interference to a wireless cable subscriber's receiver *unless* the receiver is located within the MDS/MMDS protected service area, *and* is *also* located at an ITFS registered receive site.[9] Petitioners allege that if the subscriber is not located at an ITFS registered receive site, then the ITFS licensee often is precluded from leasing excess capacity of those ITFS

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[3] This definition is provided at 47 C.F.R. Sec. 21.902(d). Although the same mathematical calculation for determining a station's protected service area is provided for both omnidirectional and directional antennas, this is usually referred to as the 15-mile radius boundary for an omnidirectional antenna and is usually referred to as 710 square miles for a directional antenna.

[4] A new power measurement was also adopted. The maximum power level is now described as 2000 watts EIRP.

[5] "[W]e believe that a transmitter output power of 100 watts coupled with a 13 dBi gain antenna will improve the signal strength *at a receiver 15 miles away* by 10 dB. ... These increases will offset, to an effective extent, the influences of terrain and atmospheric losses and permit reliable service yearround to a reasonable percentage *of a licensee's [15-mile] protected service area.*" *Wireless Cable Order,* 5 FCC Rcd at 6418 (emphasis added). *See also Further Notice of Proposed Rulemaking and Notice of Inquiry, MDS Technical Rules Order,* 98 FCC 2d 7, 12, 15 (1984); *ITFS and MDS Technical Rules Order,* 98 FCC 2d at 87.

[6] *See, e.g.,* Educational Foundation's Petition for Partial Reconsideration at 10.

[7] Any MDS licensee attempting to expand its protected service area would have a high hurdle, and any waiver request would need to show extraordinary public interest circumstances. *Thomas Radio v. FCC,* 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio, Inc. v. FCC,* 418 F.2d 1153, 1157 (D.C. Cir. 1969); *Mobile Telecommunications Corp.* , 49 Rad. Reg. 2d 1506 (1981); *see also Big Bend Telephone Co.,* 2 FCC Rcd 2413 (1986); *Tele-Media Co. of Key West,* 74 FCC 2d 554 (1979). If waiver procedures prove to be unsatisfactory, we will consider revisiting this issue of the size of an MDS station's protected service area in a future proceeding.

[8] *See, e.g.,* Educational Foundation's Petition for Partial Reconsideration at 3-7.

[9] During ITFS operations, registered receive sites are protected from harmful interference.

channels to a wireless cable operator because the wireless cable operator must provide each subscriber the same channels provided to any other subscriber. In other words, leased channels are not usable where protection from harmful interference is not assured throughout the service area. Petitioners argue that this factor diminishes the competitiveness of wireless cable by precluding use of as many as 20 channels.[10] Petitioners thus request that we establish a rule that an ITFS licensee with a contract to lease excess capacity to a wireless cable operator will be accorded a protected service area as defined in the MDS rules.

8. In a rulemaking order, the Commission previously considered this issue, and stated the following:

> The ITFS community, on the other hand, expressed the view that using a single protected service area definition for all ITFS operations was not appropriate. In support of this view, many ITFS system operators cited examples of receiver sites that were located well beyond the proposed protected service area boundary....
>
> Because of these considerations, we do not think it is appropriate to adopt specific service area boundaries for ITFS operators. We believe that it is in the best interest of that service to continue to allow ITFS operators to engineer their facilities to serve... all sites they have traditionally served regardless of location and to protect all such locations....
>
> We do not believe that similar considerations [against adoption of an ITFS protected service area] apply during the hours the ITFS facilities are being leased or being used by the licensee for non-ITFS purposes. It is likely that lessees of ITFS facilities will be offering services that are similar to those offered on MDS facilities. For this reason, we have concluded that during the hours ITFS facilities are being leased or used by the licensee for non-ITFS purposes the service area should be the same as the MDS service area. In this regard, we also stress that it is the licensee that is protected from harmful interference not the lessee.

ITFS and MDS Technical Rules Order, 98 FCC 2d at 91-93. Subsequently, in a 1989 review of an administrative decision, the Commission stated as follows:

> That [ITFS and MDS Technical Rules] Order, *supra* at 92, did state that during the hours ITFS channels are used for nonITFS purposes "the service area should be the same MDS service area." This statement, upon which Twin Cities rests its entire argument, might be confusing when read in isolation. However, when read in context, and in light of the Commission's subsequent actions, it is clear that Twin Cities relies upon an incorrect reading of this language.
>
> As discussed above, the *MDS Technical Standards Order* established by rule a 15-mile protected service area boundary for MDS, but, because the specific purpose and unique needs of ITFS would render such an interference protection scheme inappropriate, stated that specified ITFS receive sites should continue to receive interference protection at substantially greater distances, *e.g.*, 30-40 miles. It was in the wake of this discussion distinguishing the longer-range interference protection needs of ITFS licensees from those of MDS licensees, and in the wake of its explicit rejection of a 30-mile service protection area for MDS facilities, that the Commission turned to consider non-ITFS uses of ITFS stations. The Commission believed that ITFS lessees would likely "be offering services that are similar to those offered on MDS facilities." *Id.* Thus, the primary factor which required an extended receive site protection scheme for ITFS, *i.e.*, the necessity to serve distant receive sites, was not present for leased non-ITFS uses. *Id.* When the Commission stated that "during the hours ITFS facilities are being leased or used by the licensee for non ITFS purposes the service area should be the same MDS service area", *Id.*, it was not establishing a separate 15-mile protected service area for leased non-ITFS uses. Rather, it was notifying ITFS lessees and licensees that providers of non-ITFS services on ITFS facilities should not anticipate the distant interference protection, as much as 30-40 miles, which specified ITFS receive sites would be afforded. The statement merely expressed the Commission's expectation that the areas of coverage and service would not vary greatly between MDS operations and MDS-type services offered by lessees of ITFS excess capacity, and was intended simply to reflect the extent of non-ITFS service which licensees *or* lessees should generally expect to provide. The ITFS scheme of limiting interference protection to discrete ITFS receive sites was not being changed or supplemented. Non-ITFS uses of ITFS channels were to receive only that interference protection which is incidental to the protection afforded to specified ITFS receive sites.

Sherburne Wright Educational Technology Cooperative, 4 FCC Rcd 4076, 4077-78 (1989).

9. This proceeding has given us an opportunity to reexamine the issue of interference protection for wireless cable lessees in the context of our new effort to revise our rules to spur MMDS' development as a viable competitor in the video marketplace. In balancing the interests of wireless cable operators and ITFS entities in this proceeding, we are mindful of the need to enhance the ability of wireless cable operations to combine various ITFS, MDS and MMDS channels for the provision of "wireless cable" service, and to facilitate the support which leasing excess capacity affords ITFS licensees. On balance, we now conclude that we should authorize protection for ITFS licensees who lease excess capacity for "wireless cable" operations. ITFS entities can be deprived of potential

[10] In those communities with grandfathered ITFS stations on the E and F channels, 28 channels may be unavailable for leasing for "wireless cable" operations.

revenues if the ITFS entity is unable to lease excess transmission capacity free from harmful interference. In addition, wireless cable operators may be deprived of access to additional channels, free from harmful interference, that may be necessary in order to compete with a cable television company offering 50 or more channels in a particular locality. Therefore, we now decide to provide area-based protection from harmful interference to authorized and previously proposed ITFS entities during hours of leasing to "wireless cable" operators.

10. Accordingly, each current ITFS licensee and construction permittee seeking protection from harmful interference for channels leased for "wireless cable" operations must file a modification application requesting such interference protection for a service area with the same dimensions as a protected service area of an MDS station as provided by 21.902(d).[11] Future ITFS applications also must expressly include such a request, and current ITFS applications must be amended appropriately, in order for ITFS applicants to be entitled to this interference protection. After such a modification application or amendment is granted, the application of any future ITFS applicant, whose proposed facilities potentially might cause harmful interference to leased "wireless cable" operations, will be returned as unacceptable for filing unless the application is filed with a consent statement by the affected ITFS lessor.

11. We do not expect that the adoption of this interference protection standard will preclude newcomer ITFS applications in nearby areas who might cause harmful interference to the protected service area during hours of wireless cable operations. There are a number of engineering techniques which can be used, singularly or in combination, to avoid or eliminate the potential for harmful interference. Examples of such techniques include cross-polarization, receive site shielding, change in antenna height, increase or decrease of transmitter power, substitution of more modern receiving antenna, installation of a filter on receiving antenna, use of a transmitter with high stability local oscillators which allow frequency offset, change of directional antenna azimuth, change of the transmitting antenna design, or change of the radiation pattern of the transmitting antenna. In the alternative, a newcomer ITFS applicant might decide to coordinate its hours of ITFS programming with the ITFS programming schedule of the authorized or previously-proposed ITFS station so as to avoid causing harmful interference to the "wireless cable" operations. The newcomer ITFS applicant might also decide to colocate its transmitter, or to move its proposed transmitter site to provide greater separation in distance from the affected authorized or previously-proposed ITFS station. Also, a newcomer ITFS applicant might decide, where possible, to migrate to alternative ITFS spectrum, such as from the D channels to the A channels. Another technique which could be used is migration to suitable alternative non-ITFS spectrum.

12. We anticipate that any potential harmful interference that may be caused by newcomer ITFS operations could be resolved by these methods in most situations. If such techniques and alternatives fail to resolve potential interference problems, the parties may negotiate and reach a mutually-satisfactory accommodation. Indeed, we expect the parties to cooperate fully and in good faith in attempting to resolve problems of potential harmful interference. However, in the rare cases when potential interference problems cannot be resolved by the newcomer ITFS applicant or by accommodation between the parties, the Commission may review written requests for a determination on a case-by-case basis and order changes to accommodate the newcomer ITFS applicant, where appropriate.

B. *Signal Boosters*

13. In the *Wireless Cable Order*, we adopted rules for signal boosters. In order to protect authorized or previously-proposed cochannel or adjacent-channel stations from harmful interference, the new rules require that signal boosters first be authorized by the Commission before being installed and operated. *See* 47 C.F.R. Secs. 21.913 and 74.985.

14. (1) *Licensing*. Some petitions for reconsideration request that we allow construction and operation of signal boosters without consideration of the potential for harmful interference. These petitioners fear that taking interference concerns into account will result in delay and increased expense of application processing.

15. We remain concerned, however, that signal boosters within line-of-sight could cause harmful interference to a number of different receive sites entitled to be protected from harmful interference pursuant to our rules. In each instance, petitioners assumed the booster's signal would be attenuated below a harmful interference level before it reached any such receivers.[12] No evidence supporting this assumption was provided, however. To the contrary, California Amplifier argued,[13]

> at least where boosters transmit with EIRPs on the order of the 18 dbW per channel maximum permitted by newly-adopted Sections 21.913 and 74.985, it is reasonable for the Commission to require individual licensing of such boosters, with applicants required to demonstrate beforehand that proposed boosters will not cause interference.

California Amplifier's Petition for Reconsideration at 4. Thus, we continue to require generally that an interference analysis be provided to the Commission prior to authorization of a signal booster.

16. (2) *Low-Power Signal Booster Procedure*. Regarding the installation of low power signal boosters, California Amplifier proposed after-the-fact notification to cochannel and adjacent-channel applicants and licensees and to the

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[11] As requested, and in order to facilitate excess ITFS capacity leasing for wireless cable service, we will consider ITFS omnidirectional antenna proposals specifically to provide leased wireless cable service.

[12] California Amplifier asserts, for example, that signal boosters would only pose a threat of harmful interference to adjacent channel receivers "nearby." California Amplifier Petition for Reconsideration at 9, n. 11.

[13] It would be possible to install a signal booster on the rooftop of a building with line of sight to an ITFS receive antenna on a rooftop across the street, and cause harmful interference to the ITFS receive antenna.

Commission. Recent technological innovations have created a second type of signal booster which, when the characteristics of the signal booster's transmitter meet certain criteria, uses approximately one hundred milliwatts of power to provide signals to an area that is blocked by a single tall building or small hill and surrounded by areas receiving signals from the primary transmitter. In support of its proposal, California Amplifier stated,

> adoption of [its proposal] will permit ITFS licensees and wireless cable operators to benefit from evolving technological advances in low power transmission technology ... in the 2 GHz band.... By reducing the regulatory burden associated with very low power boosters to the minimum necessary to realize sound spectrum management, the Commission can provide ITFS licensees and wireless cable operators alike a flexible means of serving sites that are shadowed by intermittent obstructions.

California Amplifier's Petition for Reconsideration at 11. We revise our rules to allow pre-authorization construction and operation of a low-powered booster by an MDS,[14] MMDS, or ITFS licensee in certain prescribed circumstances.

17. We have added Sections 21.913(g) and 74.985(g) to specify the prescribed circumstances. Application must be made by an ITFS, MDS, or MMDS licensee. The power level may be no more than -9 dbW EIRP. The booster's specifications must be filed immediately at the time of booster installation. The applicant may not use this procedure if there is a grandfathered E or F ITFS receive site within one mile, unless the applicant has received the affected ITFS entity's consent. The booster location may not affect an environmental assessment location listed at 47 C.F.R. Sec. 1.1307. Copies of the application must be served on all affected MDS, MMDS, and ITFS stations. Licensees whose signals are being repeated must provide consent. The signal booster's antenna height must be below the standard requiring FAA notification pursuant to our rules. The applicant must agree that operations will cease if the booster causes harmful interference.

18. (3) *Rule Conformity.* We also grant the request of the Wireless Cable Association that the ITFS signal booster rule, Section 74.985, be conformed to the MDS signal booster rule, Section 21.913. Section 21.913 specifies that MDS boosters cannot be used to extend the primary station's protected service area and cannot be used to preclude initiation of new stations. As described in the *Wireless Cable Order,* in most instances the signal boosters will be installed to transmit a combination of ITFS, MDS, and MMDS channels. It was originally proposed that "the physical location of the booster [would be restricted] to the protected service area of an MDS station." *Notice,* 5 FCC Rcd at 977. Therefore, it is reasonable to conform Section 74.985 to Section 21.913 regarding ITFS and MDS signal booster applications and operations, especially with regard to preventing the location of a signal booster to extend the service area of the primary ITFS transmitter.

19. (4) *Interference Protection.* Questions also arose in the reconsideration pleadings as to whether signal boosters are entitled to interference protection.[15] We conclude that, generally, protection rights for boosters should follow the protection rights of the primary transmitter. Thus, in some instances signal boosters will be entitled to interference protection and in some instances they will not. For example, the licensee of an MDS station is entitled to protection from harmful interference for any signal booster and its receivers located within the boundaries of the protected service area of the primary MDS station transmitter. The question as to whether one specific signal booster would be entitled to protection from another signal booster depends on whether that first signal booster would be entitled to protection from the primary transmitter of that second signal booster. Each situation will be determined on a case-by-case basis.[16]

20. (5) *Effect on Service Area.* The signal booster rules adopted in the *Wireless Cable Order* provide that the applicant must demonstrate that the power flux density at the edge of the MDS protected service area does not exceed -75.6 dBW/m^2. *See* Section 21.913(c). Educational Foundation now requests that Section 21.913(c) be revised to state more generally "that the booster cannot be placed or have a power which would extend the service area of the station."[17] We are not persuaded that this standard proposed by the Educational Foundation would speed signal booster application processing over the objective standard adopted in the *Wireless Cable Order.* Therefore, the requested revision is not made.

21. The Wireless Cable Association also offers a revision of Section 21.913(c) and argues that it should require "a demonstration that the power flux density at any edge of the protected service area does not exceed the power flux density assuming 4/3 earth radius propagation conditions from the primary station at such edge of the protected area." In support of this request, the Association asserts that "MDS stations routinely transmit with power levels that exceed -75 dBW/m^2 at the boundary of their fifteen

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[14] In the *Second Report and Order* in this same rulemaking proceeding, we are reallocating the OFS H-channels to MDS. We thus clarify that an H-channel MDS licensee may also apply for authorization to construct and operate a signal booster, including a low-power signal booster, and may use the specific provisions adopted here concerning low-power signal boosters.

[15] There was much disagreement in the petitions, opposition and replies as to whether in the *Wireless Cable Order* the Commission authorized involuntary upgrades of ITFS stations to avoid harmful interference, when such an upgrade allows construction and operation of a signal booster. *See Wireless Cable Order,* 5 FCC Rcd at 6418; *see also Further Notice of Proposed Rulemaking, Wireless Cable Order,* 5 FCC Rcd 6472, 6474 (1990). It was argued on reconsideration that "the introduction of new service through upgrading of existing facilities should be promoted wherever possible, regardless of whether the new service is secondary or primary. Therefore, the Commission should continue to permit applicants for new low-powered boosters to satisfy their interference protection obligations by upgrading ITFS systems when necessary to avoid interference." Wireless Cable Association Opposition at 25. This issue is addressed in the *Second Report and Order* in this proceeding. Therefore, we need not discuss it in this order.

[16] An ITFS petitioner requests that an MMDS party forcing the upgrade of an ITFS station be required to compensate for the ITFS licensee's "administrative costs." The *Second Report and Order* in this proceeding considers more broadly the issue of costs to be compensated when involuntary modifications are authorized.

[17] Educational Foundation Petition for Reconsideration at 19.

mile protected service area."[18] However, we are not convinced that this revised demonstration would prevent boosters from causing harmful interference outside of the protected service area of the primary MDS station and would restrict booster emission so as not to preclude new primary stations. Therefore, we do not make the requested revisions to Section 21.913(c).

C. *Interference Protection Standards*

22. (1) *Upgrades.* In the *Wireless Cable Order*, we revised Section 21.902(f)(2), which defines harmful adjacent channel interference, with respect to the alternative use of a desired-to-undesired signal ratio of 0 dB, instead of 10 dB. The rule requires an MMDS applicant to demonstrate a desired-to-undesired signal ratio of 10 dB for an ITFS receiver constructed prior to May 26, 1983, unless the MMDS applicant demonstrates that it would proffer to the affected ITFS licensee equipment capable of meeting the 0 dB standard. If the equipment proffer demonstration is made, the MMDS applicant need only present an interference analysis that meets the 0 dB standard.

23. On reconsideration, we were asked to revise this rule provision to require, in addition to the 0 dB demonstration, a demonstration that proffered equipment would indeed eliminate harmful interference. However, we believe this additional standard would unnecessarily complicate application processing, potentially requiring a determination of what is interference "elimination" in every case. Moreover, we previously have determined that a desired-to-undesired signal ratio of 0 dB is a sufficient demonstration of the lack of harmful interference,[19] and there is no evidence this judgment is in error. We accordingly do not make the requested revision.

24. We also decided in the *Wireless Cable Order*, to "permit MDS *and ITFS* applicants to invoke the 0 dB protection standard with regard to pre-May 26, 1983, ITFS facilities...."5 FCC Rcd at 6414 (emphasis added). In petitions for reconsideration, we have been requested by some ITFS parties to revise Section 74.903(a)(2) to specify that ITFS applicants, as well as MMDS applicants, may invoke the 0 dB protection standard. Any lack of explicitness in this rule was an oversight. We thus revise Section 74.903(a)(2) to make the requested clarification.

25. (2) *Rights of Laggards.* MMDS applications were filed for most markets in 1983 with the one-day filing of more than 16,000 applications. Commenters in this proceeding argued that the failure of some 1983 MMDS applicants to perfect their applications and the failure of some 1983 MMDS applicants to construct their stations after a conditional license was issued, were making it very difficult, if not impossible, for some adjacent-channel MMDS stations in the same market, as well as cochannel and adjacent-channel MMDS stations in adjacent markets, to modify constructed stations in order to become more competitive with cable television companies. In the *Wireless Cable Order*, we thus created dual incentives in Sections 21.902(i) and 21.902(j) for a 1983 MMDS applicant to perfect its application or for a 1983 MMDS applicant to construct its station once a conditional license is issued. The rules provide that, for 1983 MMDS applications, a constructed station may modify without analyzing the harmful interference potential to an unperfected 1983 application, and they also define the showing required in an application to demonstrate a modification will not increase harmful interference to an existing station. Both Section 21.902(i) and 21.902(j) may only be invoked by a licensee of a constructed MMDS station which was proposed by an application filed on September 9, 1983. Once a 1983 MMDS application is perfected, Section 21.902(j) cannot be invoked against that application.[20]

26. Some reconsideration petitions request that we extend the benefits of Sections 21.902(i) and 21.902(j) to a 1983 applicant who has not yet perfected its application and to a 1983 applicant who is a conditional licensee but who has not yet constructed its station. However, no basis is presented as to why we should allow MMDS applications filed in 1983, but unperfected in 1991, to be amended in such a way as to cause harmful interference to another adjacent-channel or cochannel MMDS station proposed by an application filed in 1983. Nor is any reason presented as to why we should allow conditional licensees who filed MMDS applications in 1983, but who have not completed station construction in 1991, to modify the conditional license in such a way as to cause harmful interference to another adjacent or cochannel MMDS station with an application filed in 1983.

27. We continue to believe that Sections 21.901(i) and 21.902(j) are an appropriate balancing of the rights of applicants who filed on the same day. In comparison with an applicant who perfected its application and constructed its station, an unperfected applicant or unconstructed conditional licensee should bear the burden of altering its technical proposal in order to avoid harmful interference. Therefore, we do not enlarge the number of entities eligible to invoke the benefits of these rules.[21]

28. (3)

Frequency *Offsets.* We adopted in the *Wireless Cable Order* new equipment performance standards with regard to frequency offsets not only "to reduce cochannel interference," but also "to allow an increase in the number of stations in a geographic area." *Wireless Cable Order*, 5 FCC Rcd at 6420. Some petitioners argue that the frequency offset rules should be revised to prohibit licensing of "newcomer" stations employing the frequency offset engineering technique. To the extent their view seems to be that the public should not be provided increased access to entertainment and educational programming because it would result in competitors to existing stations, we do not

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[18] Wireless Cable Association Petition for Clarification and Partial Reconsideration at 11.

[19] *See ITFS and MDS Technical Rules Order*, 98 FCC 2d at 77-83.

[20] As requested, we clarify that modification applications and application amendments proposing colocation of E-group and F-group MMDS stations must be filed with the demonstration required by Section 21.902(b)(4) (applicants must engineer systems to permit adjacent-channel operation).

[21] In a related matter, we are not persuaded that it is now necessary to provide a more detailed definition than that provided in Section 21.902(e) as to the interference protection obligations of MDS stations that are allowed to cause harmful interference to another MDS station. No description was provided as to situations for which the current rule language is inadequate. Therefore, we will continue to apply the rule on a case-by-case basis.

agree. Indeed, we believe the requested revision would undermine one of the purposes for adoption of these rule provisions," to allow an increase in the number of stations in a geographic area." *Id.*

29. Some petitioners also argue that the rules concerning frequency offset transmitters adopted in the *Wireless Cable Order* now allow harmful interference to cochannel stations because the rules eliminate the requirement that a newcomer applicant demonstrate a lack of harmful interference to cochannel stations. Prior to adoption of Section 21.905(c), we required a demonstration of a desired-to-undesired signal ratio of 45 dB for MDS cochannel stations which provide video service. Petitioners express concern that adoption of Section 21.905(c) may eliminate this demonstration requirement. Specifically, they fear that, pursuant to the new rules, a cochannel station will be authorized if the applicant "proposes frequency offset and provides just a 28 dB [instead of a 45 dB] desired to undesired signal... ratio.... [T]here is simply not yet enough technical information available... to merit that degree of confidence in the ability of any given frequency offset technique to avoid interference."[22]

30. We agree with the assessment of the Wireless Cable Association that a 45 dB demonstration should still be required for MDS cochannel stations, unless there is a voluntary agreement between affected MDS station licensees to employ a frequency offset technique. Instead of adopting a separate standard for frequency offset transmitters, on a case-by-case basis, we will review requests for proffer of frequency offset transmitters for involuntary transmitter upgrades as a method to meet established interference protection standards for MDS stations of 45 dB desired-to-undesired signal ratio for cochannel stations. However, it is not necessary to revise Sections 21.905(c) and 74.961(c) to implement this change.

31. (4) ITFS Protection Standards. An ITFS petitioner asks us to clarify the protection to be afforded by ITFS applicants to previously-proposed or authorized OFS and MMDS adjacent-channel stations pursuant to Section 74.903(b).[23] In a 1986 rulemaking order concerning ITFS technical standards, the Commission stated that inter-service interference disputes not resolved by informal coordination between the parties would be reviewed by the Commission according to guidelines proposed by Microband. Those guidelines propose that "an applicant in ITFS, OFS or MMDS should provide previously granted adjacent channel stations in any of the other services the level of protection specified in the rules applicable to the previously granted service." *Amendment of Part 74 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service,* 59 Rad. Reg. 2d 1355, 1387-88 (1986). Part 21 currently specifies for MMDS stations a desired-to-undesired signal ratio of 45 dB for cochannel stations and a desired-to-undesired signal ratio of 0 dB for adjacent channel stations.[24] Using this approach, we have been able to satisfactorily resolve interference problems between stations in these three services informally. In so doing, we generally consider whether the ITFS applicant will provide a previously-proposed or authorized adjacent-channel MMDS or OFS station a desired-to-undesired signal ratio of 0 dB. We note that "authorized receiving locations" in the MMDS context includes each potential receiving location within the MMDS station's protected service area, and in the OFS context includes each potential receiving location within an OFS station's operating area.[25] We continue to

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[22] Wireless Cable Association Petition for Clarification and Partial Reconsideration at 8-9.

[23] Section 74.903(b) states *inter alia:*

> All applicants for instructional television fixed stations are expected to take full advantage of such directive antenna techniques to prevent interference to the reception of any existing operational fixed, multichannel multipoint distribution, international control or instructional television fixed station at authorized receiving locations. Therefore, all applications for new or major changes must include an analysis of potential interference to all existing and previously proposed stations in accordance with Sec. 74.903(a). An applicant for a new instructional television fixed station or for changes in an existing ITFS facilities for a construction permit must include the following technical information with the application:
>
> (1) An analysis of the potential for harmful cochannel interference with any authorized or previously proposed station if:
>
> (i) The proposed transmitting antenna has an unobstructed electrical path to receive sites. .. of any other station(s) that utilize(s), or would utilize, the same frequency, or
>
> (ii) The proposed transmitter is within 50 miles of the coordinates of any such station.
>
> (2) An analysis of the potential for harmful adjacent channel interference with any authorized or previously proposed station(s) if the proposed transmitter is within 50 miles of the coordinates of any other station(s) that utilize(s), or would utilize, an adjacent channel frequency....

Section 74.903(c) provides:

> Existing licensees and prospective applicants are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

[24] An ITFS petitioner asks that we adopt OFS rules to specify protection standards for ITFS stations as part of this reconsideration, without awaiting our determination in response to the *Further Notice of Proposed Rulemaking,* 5 FCC Rcd at 6472-6473. Rules concerning H-channel stations, including whether and which Part 21 rules should apply to H-channel stations, are addressed in the *Second Report and Order* in this proceeding, adopted the same day as this reconsideration order. We were also asked on reconsideration to conform the OFS H-channel rules to the Part 22 rules for Common Carrier Mobile Services. Because H-channel facilities are *fixed,* not *mobile,* this requested change is outside the scope of the notice for this proceeding. Therefore, we decline to adopt common carrier *mobile* services rules to regulate H-channel *fixed* facilities.

[25] In the *Second Report and Order* in this same rulemaking proceeding, we are reallocating the OFS H-channels to MDS. Thus, in the future, it is likely that only standards concerning MDS stations, including H-channel stations, will be considered.

believe that these informal procedures effectively resolve inter-service interference disputes. However, if the procedures prove unsatisfactory, we will consider adopting formal inter-service protection standards in a future proceeding.

D. *ITFS Opposition to an MMDS Station*

32.(1) *Written v. Oral Oppositions.* Wireless cable operators complained in this proceeding that some ITFS licensees were not cooperating to resolve interference conflicts with MMDS stations,[26] as required by *MMDS Allocation Order,* 94 FCC 2d at 1264; *id.* at 1236 n. 26; *id.* at 1248; *MMDS Allocation Order on Reconsideration,* 98 FCC 2d at 135; *id.* at n. 12.[27] In the *Wireless Cable Order,* we addressed this by providing a deadline for the affected ITFS licensee to raise its interference objections concerning an MMDS station.[28] *See* 5 FCC Rcd at 6413. On reconsideration, some ITFS petitioners opposed the requirement that any ITFS entity has to file an opposition; a few of these petitioners also objected specifically to a deadline for this filing.[29]

33. We are not persuaded that an ITFS licensee should be allowed to block an MMDS station without filing a written objection detailing its interference concerns, in the form of either a petition to deny or an informal objection.[30] The Commission's rules concerning petitions to deny and informal objections provide the required notice and an opportunity to be heard for the affected MMDS entity. Therefore, we do not eliminate the requirement that an ITFS licensee file a written document.

34. (2) *Number of ITFS Oppositions.* Petitioners also ask us to reduce the burden on ITFS licensees by reducing the number of interference analyses concerning MMDS proposals which must be reviewed by ITFS entities and for which an ITFS petition to deny might be filed. In the *Wireless Cable Order,* the. 8number of interference analyses to be filed by MMDS applicants with regard to ITFS licensees was increased. In the *Wireless Cable Order,* it was decided that each and every MMDS applicant would have to file all of its ITFS interference analyses at the time its application is filed. Because interference analyses must be filed by each MMDS applicant at the time its MMDS application is filed, the burden on the ITFS licensee of reviewing MMDS applications and interference analyses has expanded significantly.[31] "[G]randfathered E and F group operators will now face the administrative nightmare of coping with MMDS applications whether or not the applications are feasible." North Texas Petition at 11.

35. ITFS petitioners have raised a valid concern about the burden imposed upon ITFS licensees to review a potentially large volume of interference analyses and to file a large number of petitions to deny. They bear this burden even for applications unacceptable for filing, lottery-losing applications, applications which are never perfected, and MMDS stations which will never be constructed. To reduce this burden, some ITFS petitioners suggest that ITFS entities be required to file objections only against MMDS conditional licensees. This request would produce the smallest number of interference analyses to be reviewed by ITFS licensees. We believe a better approach is to require that ITFS interference analyses be filed after an MMDS lottery.[32] This procedure not only

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[26] Of course, some ITFS entities have cooperated in resolving potential interference conflicts with MMDS stations. They have benefited by receiving "better and more efficient communication facilities at no expense," (*MMDS Allocation Order,* 94 FCC 2d at 1248), the "technical expertise of the commercial users of the band" (*id.*) , and "reasonable compensation for any dislocations caused by the operation of [MMDS] facilities." *Id.* at 1238.

[27] Pursuant to the language in the cited decisions, we do not agree with one ITFS petitioner who claims that an ITFS licensee has no duty to resolve potential interference conflicts with an MMDS station. *See* Wisconsin's Petition for Reconsideration at 5; *see also* 47 C.F.R. Sec. 74.903(c).

[28] In the *Wireless Cable Order* this deadline is set at 90 days from the date of filing of the MMDS application. In the alternative, the deadline is 60 days from receipt of the interference analysis by the ITFS licensee, if this date is later than the 90th day after filing of the MMDS application.

[29] We also were asked by some ITFS petitioners to reallocate the E and F channels from MMDS back to ITFS. The *Notice of Proposed Rulemaking* and the *Report and Order* in this proceeding did not address such a reallocation. Reallocation is not an issue properly raised on reconsideration. Furthermore, we believe our recent actions will stimulate the offering of wireless cable service.

[30] Any ITFS licensee which does not wish to file a "formal" petition to deny may file an informal objection as described at 47 C.F.R. Sec. 21.30.

[31] Before the adoption of the *Report and Order* in this proceeding, ITFS licensees usually needed to review only interference analyses prepared by one lottery-winning MMDS applicant. After the adoption of the *Report and Order,* an ITFS licensee might now have to review 150 interference analyses, instead of one interference analysis. While there is only one lottery-winning application in a specific market for one channel group, historically, there have been as many as 150 MMDS applications participating in that lottery. Interference analyses for each of these MMDS applications, as opposed to a single lotterywinning application, would require review.

[32] In order to allow MMDS applications to be filed for areas where there are grandfathered ITFS stations on the E or F channels, two presumptions were adopted in the *Wireless Cable Order* and incorporated into the rule requirements concerning MMDS applicants filing interference analyses, at subsections 21.901(d)(1)(i)(A) and (B). Sections 21.901(d)(1)(i)(A) and (B) read as follows:

> (A) This analysis may presume the displacement or discontinuation of a co-channel, grandfathered ITFS station, if such displacement or discontinuation is necessary for an analysis demonstrating the applicant's transmitter will not cause harmful interference to such ITFS station.
>
> (B) This analysis may presume the displacement of any pointto-point operation of an ITFS station if such displacement or discontinuation is necessary for an analysis demonstrating the applicant's transmitter will not cause harmful interference to such ITFS station.

Due to the postponement of the deadline for filing ITFS interference analyses, these two presumptions are no longer necessary in order to allow some MMDS applications to be filed in such circumstances. These two presumptions are being eliminated from our rules. Therefore, we need not consider any objections raised by ITFS petitioners concerning these two rule provisions.

allows us to reduce the number of interference analyses to be filed and reviewed by the parties but also provides processing efficiency.

36. For MMDS applications that go to lottery, an MMDS applicant whose application is tentatively selected for qualification review must file the ITFS interference analyses within 60 days after the public notice announcing the tentative selection in a lottery. *See* 47 C.F.R. Sec. 1.824(c). ITFS licensees would file oppositions against the MMDS application that is tentatively selected by lottery for qualification review, within 120 days after the public notice announcing the tentative selection in a lottery.[33]

37. For MMDS applications that do not go to lottery, the Commission will issue a specific public notice identifying these applications. The ITFS interference analyses would be due by the MMDS applicants within 60 days of this public notice. ITFS entities would then have an additional 60 days within which to file petitions to deny against the MMDS applications identified in the public notice as not going to lottery.[34] Our rules are revised accordingly.[35]

38. (3) *ITFS Service.* We received numerous requests on reconsideration that MMDS entities' obligations be simplified with respect to serving ITFS entities with copies of MMDS interference analyses. $[36] It is argued that if, as required, an MMDS entity files a certification demonstrating that a copy of each ITFS interference analysis has been mailed to the affected ITFS licensee by certified mail, the MMDS entity should not also have to file three additional documents demonstrating that diligent efforts have been made to serve an ITFS licensee who refused certified mail or who neglected to advise the Commission of a change of address. From the reconsideration pleadings, it appears that the underlying problem is that ITFS station files do not always reflect a current address for the ITFS licensee.[37]

39. Since adoption of the *Wireless Cable Order,* our experience has been that the lack of a current address in the ITFS file has required the MMDS application processing staff to process four documents on ITFS service, with a burdensome effect on MMDS application processing. No party filing comments in this proceeding and no petitioner for reconsideration alleged that any MMDS entity, in fact, failed to serve any ITFS licensee. Therefore, we modify our rules concerning service of the ITFS interference analysis. An MMDS applicant filing an initial application for a new station on December 30, 1991, or thereafter, must submit with its ITFS interference analysis a certificate of service for the affected ITFS licensees and construction permittees (and addresses) stating that the interference analysis has been sent by certified mail, return receipt requested.[38] The MMDS applicant must also file, on or before the 120th day after the prescribed public notice of its MMDS application, one statement confirming service on each affected ITFS licensee or construction permittee. In this manner, on the due date for any ITFS petition to deny, the MMDS processing staff will have information as to whether or not each affected ITFS licensee or construction permittee has received a copy of the interference analysis.[39]

40. (4) *Number of Interference Analyses by MMDS.* Prior to our adoption of the *Wireless Cable Order,* an MMDS applicant, before grant of its application, was required to file an ITFS interference analysis for only *licensed* ITFS stations pursuant to former Section 21.902(i). That rule did not include a duty to analyze ITFS applications or construction permits. The *Wireless Cable Order,* in specifying that ITFS interference analyses would be filed by MMDS applicants, instead of primarily being filed by MMDS conditional licensees, changed the timing for filing the ITFS interference analyses, while the class of ITFS entities analyzed by an MMDS applicant remained the same, i.e., the ITFS *licensee.*

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[33] If an ITFS entity is not served in a timely manner so that these pleading periods can be met, we will ensure that that ITFS entity is given 60 days to respond to the MMDS applicant's interference analysis.

[34] *See* n. 33 *supra.* We will retain the rule provision concerning a presumption of a lack of ITFS objection if no petition to deny or informal objection is filed in a timely manner. We will also retain the rule provision concerning ITFS consent to MMDS operations as a substitute for an MMDS applicant's demonstration of a lack of harmful interference. It has been our experience that MMDS and ITFS parties may reach a negotiated accommodation so that both can operate in the same area, or the ITFS licensee may agree to modify its operations. Potential areas for accommodation include colocation, lease of excess capacity, relocation of ITFS facility to suitable alternative spectrum or to coaxial cable facilities at the expense of the MMDS entity, purchase of substitute ITFS transmitter or receiver equipment by the MMDS entity, the use of frequency reuse techniques such as cross-polarization, site shielding and frequency offsets, and provision of ITFS programming on the MMDS facility. *See* 94 FCC 2d at 1237.

[35] Despite the request of one ITFS petitioner, we will not require point-to-*multipoint* MMDS stations to migrate to alternative point-to-*point* spectrum, in lieu of ITFS point-to-point displacement. In addition, it is not correct that Commission rules do not provide for the loss of licenses for MMDS stations which are constructed, but not operational for a specified time period. Sections 21.303 and 21.44 provide for automatic forfeiture of Part 21 licenses in such circumstances.

[36] The service requirements adopted in the *Wireless Cable Order* are described at Sections 21.901(d)(1)(iii), (iv), (v) and (vi).

[37] As one ITFS licensee noted, if an ITFS licensee wishes its attorney or engineer to be served by certified mail, it merely has to submit a letter to the Commission instructing that its agent for service concerning a specified ITFS station is a designated person at a specific address.

[38] If at any time, an ITFS licensee or construction permittee is unsure as to whether its station file reflects its current address, the ITFS licensee or construction permittee could avail itself of the opportunity to send to the Commission a copy of its current address for inclusion in the station file. The MMDS applicant must use for service the most current address of the ITFS licensee in the ITFS station file. The MMDS applicant must also use for service any more recent address of the ITFS licensee or construction permittee known to the MMDS applicant.

[39] In establishing deadlines for the rule provision concerning the duty of MMDS entities, footnote 16 of the Wireless Cable Order segregated MMDS applications into three categories based on the filing date of the application: (1) applications filed prior to October 11, 1990; (2) applications filed from October 11, 1990 through January 24, 1991; and (3) applications filed after January 24, 1991. One ITFS petitioner objected to this segregation scheme, complaining it was too complex. However, our experience since October 11, 1990 has been that sufficient notice was provided to MMDS entities as to their deadlines for compliance.

41. After almost eight years, it is reasonable that the *Wireless Cable Order* created an incentive for ITFS applicants and permittees on the E and F channels to become licensees,[40] especially in view of the fact that we simultaneously: (1) precluded some MMDS applications from being filed; (2) imposed the burden on many more MMDS applicants to demonstrate a lack of harmful interference to ITFS stations on the E and F channels; and (3) imposed the burden on our processing staff to review potentially many more ITFS interference studies. The prosecution of ITFS applications and construction of ITFS stations, so that MMDS entities can redesign their own station proposals to avoid harmful interference, is one of the steps adopted in the *Wireless Cable Order* to enhance the capability for a "wireless cable" system to compete with other providers of video service. Therefore, it was appropriate to choose in the *Wireless Cable Order* ITFS licensees as the proper class for interference analysis.

42. According such status to pending ITFS applications may prevent MMDS stations from going on the air. If there are a number of pending, mutuallyexclusive, cochannel ITFS applications in a particular area, and MMDS applicants are required to show a lack of harmful interference to each, the task for the MMDS applicant becomes nearly impossible due to conflicts in technical design, specifications and locations of the various ITFS proposals. Thus, as long as these mutually-exclusive ITFS applications remain pending, they can effectively preclude MMDS operations. This sometimes prevents the public from receiving any "wireless cable" service in that community.

43. There can be similar problems for MMDS applicants with regard to ITFS construction permits. If repeatedly extended, ITFS construction permits can prevent MMDS stations from commencing operation. For example, while it might be possible to demonstrate a lack of harmful interference to either the licensed ITFS station or a construction permit for a change-of-location of the same ITFS station, it is usually not possible for an MMDS entity to provide concurrently such demonstrations for both. Again, the public sometimes loses an opportunity for "wireless cable" services.

44. A few ITFS petitioners now ask that we increase the number of interference analyses to be filed by MMDS applicants to include ITFS applications and construction permits. After consideration of the pleadings which raised this issue on reconsideration, we are not persuaded that the existence of an ITFS application on the E or F channels, filed prior to May 23, 1983, should necessarily preclude an MMDS station from operating. [41] However, we are willing to extend the duty of MMDS applicants filing an initial application for a new station on or after December 30, 1991 to file an interference analysis for an ITFS E or F-group construction permit, if the construction permit was authorized by grant of an ITFS application filed prior to May 26, 1983, proposing a transmitter site within 50 miles of the proposed transmitter location of the MMDS station. Our rule provisions are modified accordingly.

E. *ITFS Excess Capacity Leasing Rules*

45. In 1983, the Commission decided to allow ITFS licensees to lease excess capacity on their systems for non-ITFS programming. ITFS licensees are allowed to decide what hours each week they are willing to lease consistent with the prescribed 40 hours per channel per week requirement and related restrictions described at Section 74.931(e)(1).[42]

46. Several ITFS and wireless cable petitioners complain that the Commission basically ignored the numerous comments filed in this proceeding requesting that we revise our rules to allow ITFS excess capacity to be used to enhance the capability of wireless cable operators to compete with cable television companies.[43] These petitioners argue that many of the Commission's rules and practices severely inhibit the use of ITFS excess capacity by a wireless cable operator. For example, they claim the 20 hours each week which is required to be subject to "ready recapture" is not economically viable for a wireless cable operator.

47. These ITFS and "wireless cable" petitioners assert that it is not necessary for the Commission to impose cumbersome restrictions on qualified ITFS licensees who use their channels primarily for "legitimate" educational and instructional purposes, but happen to lease excess capacity.[44] The petitioners emphasize that the strict ap-

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[40] The MMDS Allocation Order recognized that some ITFS entities that were applicants or permittees on May 23, 1983, might never become ITFS licensees, and therefore granted certain rights only to ITFS applicants and permittees that became ITFS licensees." Existing ITFS licensees (as well as existing permittees and applicants *that eventually become licensees)* of the reallocated channels would be grandfathered in perpetuity." *See* 94 FCC 2d at 1247 (emphasis added).

[41] In the *Wireless Cable Order,* we created a parallel incentive for 1983 MMDS applications to be perfected, and for MMDS stations to be constructed if proposed in an application filed in 1983. *See* 5 FCC Rcd at 6412.

[42] Section 74.931(e)(1) states as follows:

> The licensee must preserve at least 40 hours per week, including at least 6 hours per weekday (Monday through Friday), excluding holidays and vacations days, for ITFS purposes on that channel. The 40-hour preservation may consist of airtime strictly reserved for ITFS use and not used for non-ITFS programming, or of time used for non-ITFS programming but subject to ready recapture by the licensee for ITFS use with no economic or operational detriment of the licensee. At least 20 hours per week of the preserved time on each channel must be used for ITFS programming, including at least 3 hours per weekday, excluding holidays and vacation days, except that for the first two years of operation, an ITFS entity may lease excess capacity if it uses at least 12 hours per channel per week for ITFS programming, including up to four hours of ITFS usage per day. Only ITFS programming and preserved airtime scheduled between 8:00 a.m. and 10:00 p.m., Monday through Saturday, will qualify to meet these requirements.

[43] *See, e.g.,* The Wireless Cable Association's Petition for Clarification and Partial Reconsideration at 13.

[44] Petitioners cite the dichotomy between the restrictions imposed on ITFS licensees who lease excess capacity and licensees who do not lease. If an ITFS licensee is not leasing excess capacity, there is no minimum programming requirement. The requirement to provide ITFS programming just applies if the

plication of Section 74.932, which limits eligibility to accredited local educators, as either licensees or users, and Section 74.931(e), which requires 20 hours per week per channel of ITFS programming as a condition precedent to the leasing of excess capacity, are sufficient to insure "that ITFS licenses are not merely secured to reap financial benefits from wireless cable operators." Wireless Cable Association Petition for Clarification and Partial Reconsideration at 14.

48. The ITFS leasing provisions reflect a balancing of the Commission's concern for restricting ITFS spectrum to legitimate ITFS operations, on the one hand, and ensuring full spectrum utilization, on the other. "[W]e do expect ITFS licensees to utilize each of their main channels substantially for4legitimate ITFS use." *MMDS Allocation Order,* 94 FCC 2d at 1251.[45] However, "we do not wish to force ITFS channels to remain idle when other legitimate demands for the channels exist. Such an outcome is precisely the situation that we are attempting to avoid by allowing shared [ITFS/MMDS] use of the channels." *Id.*

49. We are persuaded by the record evidence that our current leasing rules, adopted to insure that "entities not primarily interested in providing ITFS programming"[46] do not qualify to become ITFS licensees, preclude ITFS excess capacity leasing by "legitimate" ITFS licensees in many instances. Accordingly, in order to facilitate leasing and to afford maximum flexibility to both ITFS licensees and "wireless cable" operators, we will modify the "ready recapture" provision and eliminate the time-of-day and day-of-week restrictions of Section 74.931(e) with regard to leasing for "wireless cable" operations.[47]

50. Under our revised rules, the ITFS licensee still must provide ITFS programming twenty (20) hours per week per channel before leasing any excess capacity. All hours not used for ITFS programming may be leased to a "wireless cable" operator. However, an additional 20 hours per week per channel must be reserved for recapture by the ITFS licensee, during hours of the day and days of the week to be negotiated by the licensee and lessee, subject to one year's advance, written notification by the ITFS licensee to the lessee. We continue to believe that such a "ready recapture" requirement strikes the appropriate balance between our interest in promoting alternative uses of excess ITFS spectrum, on the one hand, and our interest in ensuring that ITFS entities retain the right to fully exploit their ITFS channels for legitimate educational purposes, on the other. We therefore decline to eliminate our ready recapture provisions entirely at this time.

51. We are sympathetic, however, to the requests of some petitioners that we afford ITFS and MMDS entities more flexibility in deciding when to schedule the hours of ITFS programming protected by our leasing rules. Therefore, in order to grant ITFS lessors and MMDS lessees greater opportunity to develop a program schedule that best accommodates their respective needs, we will eliminate the requirement that the 40 hour per week per channel reservation must be scheduled between 8:00 a.m. and 10:00 p.m. Monday through Saturday and the restriction that this 40-hour reservation must be scheduled on each channel 6 hours per day, Monday through Friday. Similarly, we will no longer require that the basic 20 hour per week per channel programming requirement must be scheduled between 8:00 a.m. and 10:00 p.m. Monday through Saturday, with 3 hours per channel per day of such programming carried on Monday through Friday.

52. ITFS and "wireless cable" petitioners also ask that the Commission on reconsideration specifically authorize the use of channel mapping technology by ITFS licensees who wish to lease excess capacity. Most programmers require that programming be supplied on the same channel at all times. The 20 hour or 12 hour time restrictions for each channel on leasing of ITFS excess capacity preclude use of one ITFS channel (C1, for example) to provide non-ITFS programming. One mechanism which is available in order to meet both the Commission's leasing restrictions and the programmer's requirements is channel mapping technology. The leasing is scheduled on different channels in a staggered pattern and specialized equipment is used so that one type of programming is switched automatically at a prescribed time from C1, to C3, to C2, to C4, to C1, and so forth. The subscriber's channel selection is unchanged and the subscriber is unaware that the channel is automatically switched. After consideration of the pleadings received on this issue, we will allow ITFS licensees to lease excess capacity to a "wireless cable" operator in such a manner as to allow the wireless cable operator to use channel mapping technology.[48] This will allow for sufficient use of all channel capacity while balancing the interests of both wireless cable operators and ITFS licensees.

F. *CARS Eligibility*

53. In the *Wireless Cable Order,* lessees of ITFS excess capacity were made eligible for Cable Antenna Relay Service (CARS) spectrum, but ITFS licensees were not, because it was decided that ITFS licensees had no need for CARS spectrum. ITFS petitioners request that the Commission revise its rules to make ITFS licensees also eligible for CARS spectrum, arguing ITFS licensees have a need for CARS spectrum.[49] Other arguments were also

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ITFS licensee leases excess capacity. Petitioners request a lessening, but not elimination, of the leasing restrictions. We consider a lessening of the leasing restrictions at paras. 49-52 *supra.*

[45] We remain concerned that "entities not primarily interested in providing ITFS programming" do not become ITFS licensees. *MMDS Allocation Order on Reconsideration,* 98 FCC 2d at 137. We will strictly enforce the existing eligibility rules. We will consider restricting ITFS eligibility criteria if the need arises.

[46] *MMDS Allocation Order on Reconsideration,* 98 FCC 2d at 137.

[47] We will continue to review ITFS programming proposals in applications, including the leasing of excess capacity, to assure that the nature and scheduling of ITFS programming is consistent with the primarily educational purpose of this spectrum. In this regard, the appropriate educational use of licensed ITFS frequencies will also be reviewed upon renewal.

[48] Of course, ITFS applicants should not request more frequencies than necessary for their educational needs.

[49] *See, e.g.,* Arizona's Petition for Partial Reconsideration at 6-7 ("[T]here are already too few available alternatives [for STLs, mobile pickup stations, etc.] for many ITFS licensees."); New York's Petition for Reconsideration at 2-4 ("[T]he Commission

presented, such as, CARS eligibility would allow the ITFS licensee to exercise control over the ITFS station. It was alleged:

> ITFS licensees retain ultimate responsibility for the operation of their facilities even when those facilities are being used by an excess capacity lessee to provide wireless cable services. The Commission holds ITFS licensees entirely responsible for full compliance with all Commission rules. In order to fulfill their statutory obligations to bear ultimate responsibility for the operation of licensed ITFS facilities, ITFS licensees may find it necessary to hold the licenses for the CARS facilities....

New York's Petition for Reconsideration at 3 (footnote omitted). However, these petitioners are not proposing to use this CARS spectrum for "wireless cable" operations, but as an enhancement of their educational programming. In view of the considerable demand for CARS spectrum by entities now eligible for CARS licenses, and the absence of a sufficient showing of need for CARS spectrum by ITFS entities we are not persuaded that the delivery of ITFS is a proper use of the CARS frequencies as a general matter. We accordingly will not make ITFS licensees generally eligible for CARS spectrum.

54. However, in the *Wireless Cable Order,* it was decided that "we will provide for the ability of MDS operations to displace all point-to-point operations on the E and F channels" to suitable alternative spectrum. 5 FCC Rcd at 6415. Therefore, at locations where CARS is suitable alternative spectrum, we will make ITFS licensees eligible for CARS spectrum to the limited extent necessary to allow ITFS point-to-point migration for the purposes specified in the *Wireless Cable Order.*

G. *Cable Television Company Prohibitions*

55. In the *Wireless Cable Order,* we considered the scarcity of microwave spectrum available for "wireless cable" operations, and noted use of this spectrum for operations by cable television companies would preclude its use for "wireless cable" operations. 5 FCC Rcd at 6417. We decided that ensuring the opportunity for competition by wireless cable operations to cable television companies[50] outweighed the benefits of enhancing cable television company operations.[51] We adopted rules to prohibit, directly or indirectly, ownership interests in, control of, or leasing of MDS, MMDS, or ITFS capacity by cable television companies in geographic areas which overlap the MDS or MMDS protected service areas, or are within 20 miles of an ITFS transmitter, for cable franchise areas lacking two or more competing cable television companies. *Wireless Cable Order,* 5 FCC Rcd at 6416-17.

56. Several cable companies request that we reconsider and rescind or narrow the scope of these ownership and leasing prohibitions.[52] These petitioners argue that this microwave spectrum should be used to enhance cable operations. They do not, however, explain how the requested revisions would enhance the ability of wireless cable operations to compete with cable television companies.[53] The Wireless Cable Association "vehemently opposes" proposals to repeal or relax the attribution rules in Section 21.912. Wireless Cable Association Opposition at 14-15.

57. We will not make any fundamental changes in these rules in this proceeding. Indirect and non-controlling cable interests may still inhibit competition by MDS stations with cable television companies. *See Wireless Cable Order,* 5 FCC Rcd at 6416-17.[54] However, direct and indirect, controlling and$non-controlling interests may be held by a cable television company in a wireless cable system

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did not adequately consider that ITFS licensees, like MDS licensees, need CARS facilities to connect various parts of their ITFS programming networks.").

[50] "In areas that are or are about to be cabled, competition from multichannel MDS may spur cable systems to build promised cable systems faster, improve existing systems, and keep prices low." *MMDS Allocation Order,* 94 FCC 2d at 1228.

[51] Initially, cable television companies were free to directly or indirectly own or control an MDS or MMDS licensee, lease from an MDS or MMDS licensee, or lease excess capacity from an ITFS licensee. *MMDS Allocation Order,* 94 FCC 2d at 1267. Thus, it was possible for a cable television company to enhance its cable operation in its own franchise area, including using its own MMDS station to deliver programming from its satellite earth station to its cable system headend. In addition," it [was] possible that a cable television company that had been awarded a cable franchise for a particular area but had not yet constructed its system would find it in its best interest to purchase the multichannel MDS license and not use the station, thereby preventing the establishment of MDS service in the area. This would preserve the largest possible customer base for the cable company." *MMDS Allocation Order, Id.* at 1262.

[52] The *Wireless Cable Order* announced that MDS and MMDS applications from cable companies would not be granted after October 11, 1990. *Wireless Cable Order,* 5 FCC Rcd at 6417. One petitioner requests that such applications be granted if filed more than 60 days prior to that date. This issue will be addressed in the *Second Report and Order* in this proceeding.

[53] One cable company argues that a cable company may decide to compete with another cable company, even a vertically integrated cable company, and therefore, this scarce spectrum should be used to enhance all cable companies. However, criteria are not provided to distinguish cable companies willing to compete with vertically integrated cable operations. We are not persuaded to abandon generally the benefits of enhancing "wireless cable" operations. We remind this petitioner that these cable prohibitions are inapplicable if there is another cable system in the franchise area operating in a substantial portion of the protected service area of the proposed MDS station. In addition, we do consider exemptions, exclusions and waiver provisions for these rules in the *Second Report and Order* in this proceeding.

[54] The Wireless Cable Association (WCA) requests clarification of the use of the term "cable television company" in Sections 21.912 and 74.931(e). The association expresses the concern that some microwave companies may be prohibited, if they use some wire or cable in distribution of programming to some "wireless cable" subscribers. The association notes that in some instances an MDS, MMDS, or OFS licensee uses cable to serve customers in a residential development, trailer park or other private enclave that has adopted restrictions on the erection of outdoor antennas, or where antennas are not feasible. It therefore argues that the Commission should exclude from its definition of a cable television company for purposes of Section 21.912 any company that serves less than 50 percent of its total subscribers by coaxial cable. The Commission previously-decided that radio transmission services, such as MMDS, that do not use closed transmission paths at all or do so only within individual buildings, are not cable television systems. *Definition of a Cable Television System,* 5 FCC Rcd 7638 (1990). Therefore, any MDS, MMDS or OFS licensee that satisfies the Commission's decision defining a cable television system is excluded from the defini-

outside of its franchise area. In addition, we are not persuaded that leasing by cable television companies of MDS, or MMDS, or ITFScapacity in their franchise areas generally should be allowed.[55] The prohibitions we adopted are appropriate measures to enhance competition. Waivers, exemptions and exclusions to this set of rules are being considered in the *Second Report and Order* in this proceeding.

H. ***MDS Cut-Off Rule***

58. In their petition for reconsideration, Applied Telemedia Engineering and Management, Inc. and its joint petitioners (ATEAM) ask us to rescind the new MDS/MMDS cut-off rule,47 C.F.R. Sec. 21.914. They argue that the rule: (1) violates the First Amendment in that it effectively deprives a potential MMDS applicant who is entitled to claim a minority or diversity preference of any notice to file an application and of any opportunity to compete for a license, (2) violates the Communications Act in that it effectively deprives MMDS applicants from filing mutually exclusive applications, (3) violates standards for licensing rules for a media of mass communications, (4) violates the Administrative Procedure Act because it was adopted without notice to the public, without adequate discussion of our purpose in adopting the rule, and was made effective immediately upon publication in the Federal Register, and (5) is unlawful because the rule will be applied retroactively.[56]

59. (1) *First Amendment.* ATEAM claims that the First Amendment requires that potential MMDS applicants entitled to claim a minority or diversity preference be given an opportunity to see on public notice a previously filed MMDS application for a particular frequency and location, and at least a 30-day period to file a competing application. ATEAM argues that applicants entitled to claim preferences would never file an MMDS application without such notice of a previous filing. We disagree. Our experience is that potential applicants entitled to claim a minority or diversity preference are capable of and have selected valid locations and frequencies for a proposed MMDS station. Therefore, the Commission's goals concerning minority and diversity ownership of MMDS stations are not affected by our adoption of the new MDS/MMDS cut-off rule. The same reasoning applies to potential MMDS applicants who are not entitled to claim a preference. Nothing in the First Amendment restricts the Commission's authority to prescribe new cut-off rules for MMDS applications. *See generally NBC v. FCC*, 319 U. S. 190 (1943). We thus reject ATEAM's claim that our adoption of a new cut-off rule for MMDS applications violates the First Amendment.[57]

60. (2) *Communications Act.* ATEAM also claims that the new MDS/MMDS cut-off rule precludes MMDS applicants' participation in a lottery and that the new cut-off rule effectively destroys the right of the public to file competing MMDS applications under the Communications Act. ATEAM Petition for Reconsideration at 9. We reject these claims.

61. The new cut-off rule is conceptually similar to the one-day filing requirement used initially for MMDS applications. At the time the Commission created MMDS, it stated:

> [W]e believe it is necessary to adopt procedures to deal with what we referred to in the *Cellular Reconsideration Order* as "one-upman-ship". There we stated that: "We want all participants to file applications which represent their best view of a service plan for the same SMSA. To do so, we do not find it necessary for participants to consult the plans of their potential competitors.... This would undermine our ability to compare proposals with some measure of confidence that the applicants had participated in its development. Plans based on another proposal would no longer represent the applicants' best idea of how to serve a given area but would, instead, represent applicants' use of the administrative process to obtain an advantage over competitors...."Our experience with both MDS and the more recently authorized Digital Electronic Message Service (DEMS) has taught us that some applicants merely copy applications that have previously been filed and resubmit them with the names changed. We believe that this kind of activity does smack of the 'land rush' or 'gold rush' mentality that concerned many of the commenters in this proceeding. Our experience with single channel MDS applications is that in many instances a local entity will perceive the need for service in its community and file the appropriate application only to have another entity file a competing application on the final day al-

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tion of a cable television company for purposes of Sections 21.912 and 74.931(e). We are not convinced that the problem identified by WCA is so widespread that we cannot address on a case-by-case basis clearly-identified special needs of a "wireless cable" operator that do not satisfy our definitions. Thus, we will not change our rules to specify the exclusion requested by WCA.

[55] However, as requested, we clarify Sections 21.912 and 74.931(e)(5). Our rules allow a cable television company to be the *lessor* of programming, for example. Thus, an MDS station licensee may lease programming *from* a cable company or its affiliate, such as HBO. An MDS station licensee may also lease antenna space *from* a cable system on the cable system's antenna tower. Also, an ITFS licensee may lease cable system capacity *from* a cable television company to deliver educational programming to ITFS enrolled students. Except for any exemptions, exclusions or waiver provisions established in the *Second Report and Order* in this proceeding, we will maintain our general restriction against the lease of excess capacity of ITFS channels or the lease of MDS/MMDS channels *to* a cable television company, or affiliate, as lessee.

[56] ATEAM also filed a motion requesting stay of the effectiveness of the new MDS/MMDS cut-off rule during the pendency of its reconsideration petition. With the release of this order on reconsideration, ATEAM's stay request becomes moot. Therefore, we hereby dismiss its stay request.

[57] ATEAM argues that an MMDS applicant who filed before the rules became effective and would have been entitled to claim a preference would wish its application to go to lottery, and thereby suffers a detriment from not going to lottery if it receives cut-off protection after October 31, 1990. We disagree. If an MMDS applicant who is entitled to claim a minority or diversity preference files an application that is not mutually exclusive with another application, its application is processed alone, a substantial benefit to that applicant.

lowed by our Rules thereby delaying the introduction of service to the public. We do not believe that such activity is in the public interest.

MMDS Allocation Order, 94 FCC 2d at 1265-66. Therefore, we initially limited the filing of MMDS applications to one day, September 9, 1983. Despite ATEAM's claim that no member of the public would ever file an MMDS application without first seeing on public notice a previously filed MMDS application specifying selection of a particular location and frequency group, our experience in 1983 was that approximately 16,500 members of the public filed without a previously filed MMDS application appearing on public notice. These 16,500 applicants included a significant portion entitled to claim a minority or diversity preference. Contrary to ATEAM's claim, it was possible to hold lotteries and to apply preference claims for these 1983 applications, despite a one-day filing period.

62. Nothing in the language of the Communications Act, including Section 309(i), nor in any of ATEAM's cited case law, requires that a mutual-exclusivity cut-off period be of a certain duration for MDS/MMDS applications.[58] As noted in the Wireless Cable Association Opposition at 9, "[a]ll the Report and Order has done is reduce the length of the cut-off period -- a reduction that has no disparate effect on any of the groups Section 309(i) is intended to benefit."[59] All MMDS applicants that meet the eligibility criteria to receive a minority or diversity preference will be awarded a minority or diversity preference as required by Section 309(i). The new cut-off rule in no way affects that criteria prescribed by Section 309(i).

63. We also conclude that no other provision of the Communications Act prohibits the establishment of a new cut-off rule for MDS/MMDS applications.[60]

"There is no merit to the appellant's position that a published list of filed applications and the establishment of a cut-off date is the *sine qua non* for cutting off subsequent applications." *Century Broadcasting Corp. v. FCC*, 310 F.2d 864, 866 (D.C. Cir. 1962)(rejecting appellant's argument that the FCC's "establishment of... a cut-off date 'does not fairly advise prospective applicants but only advises of a *fait accompli*. '" *Id.* at 867).

64. (3)*Media of Mass Communications Licensing Standards.* ATEAM's third argument for why the new MDS/MMDS cut-off rule should be rescinded is that the Commission lacks authority to adopt the new rule because MMDS is a media of mass communications. ATEAM states that this fact requires the Commission to "periodically publish[] a list of [MMDS] applications that are near the top of the processing line" and "announce[] a date, at least 30 days from publication, by which competing applications must be filed if they are to receive comparative consideration with any application on the list." ATEAM's Reply at 8, quoting *Ranger*, 294 F.2d at 243. ATEAM argues that the Commission is thus precluded from shortening the cut-off period to less than 30 days from publication because such shortening "effectively destroys the right of the public to compete for wireless cable licenses."[61] We disagree. Our staff estimates that during the year after our adoption of the new cut-off rule almost twice as many MDS and MMDS applications were filed as were filed during the year before the rule was adopted. We find that the public is competing for MDS and MMDS licenses.

65. Other aspects of ATEAM's argument also fail to persuade us that the new MDS/MMDS cut-off rule should be rescinded. An MMDS station is a medium of mass communications in the sense that MMDS applicants who are eligible may claim a minority or diversity preference and are awarded a minority or diversity preference in a lottery of mutually-exclusive applications.[62] The adoption of a new cut-off rule in no way changes the eligibility criteria for:, MMDS preference claims or the award of preferences for MMDS lotteries. There is nothing in the

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[58] The Commission has adopted one-day cut-off rules for a number of different services: *Amendment of Part 90 of the Commission's Rules to Provide for the use of the 220-222 MHz Band by the Private Land Mobile Radio Services*, 6 FCC Rcd 2356 (1991), *petitions for recon. pending; Amendment of Part 94 of the Rules regarding Point-to-Multipoint Use of the 2.5, 10.6, and 18 GHz bands by Private Operational Fixed Microwave Licensees*, 5 FCC Rcd 1220, 1224 (1990); *Amendment of Parts 1, 21, 22, 74 and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and Non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz*, 4 FCC Rcd 2012, 2014 (1989); *Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcasting Applications*, 50 Fed. Reg. 19936 (1985).

[59] *See Ranger v. FCC*, 294 F.2d 240,244 (D.C. Cir. 1961)("Some such [cut-off] rule was necessary to meet the problems created by the *Ashbacker* doctrine, and the manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable." *Id.)* . The MDS cut-off rule meets the reasonableness test of *Ranger* because it eliminates the ability of potential applicants to photocopy previously-filed applications, it encourages the prompt filing of MDS or MMDS applications by serious applicants, not speculators, it enhances administrative efficiency in application processing, and it helps speed service to the public.

[60] We also conclude that the Supreme Court expressly noted that the Commission may promulgate regulations limiting the filing rights of competing applicants, so long as adequate notice of the proposed rules is given and the rules are reasonable. *Ashbacker v. FCC*, 326 U.S. 327, 333 n. 9 (1945).

[61] ATEAM also contends that only members of one particular trade association would file MMDS applications after adoption of the new cut-off rule, and thus, people who are not members of this one particular trade association, identified as "the public," would be precluded from filing MMDS applications. Contrary to ATEAM's contentions, however, after our adoption of this new cut-off rule for MDS/MMDS applications," the public," both applicants who are members of the specified trade association and applicants who are not members of the specified trade association, did file MDS and MMDS applications. In fact, since the adoption of Section 21.914, it appears that more MDS and MMDS applications have been filed by applicants who are not members of the specified trade association. We find that our adoption of Section 21.914 has not precluded "the public" from filing MDS and MMDS applications.

[62] However, MMDS is not a broadcast service and the MMDS processing rules do not have to duplicate broadcast processing rules. *See Subscription Video*, 2 FCC Rcd 1001 (1987). Single-channel MDS applications are selected by comparative hearing, not lottery, and therefore, preferences are not applicable to MDS applications.

Communications Act or elsewhere that requires a 30-day cut-off period for such applications. The *Ranger* case cited by ATEAM is irrelevant on this point because the court in *Ranger* was merely describing the particular cut-off rule adopted for the broadcast radio service at issue; the court was not stating that a 30-day cutoff period was required for all services regulated by the FCC. 294 F.2d at 243. Thus, we reject ATEAM's contention that classification of an MMDS station for lottery preference purposes as a medium of mass communication restricts our authority to adopt a new MDS/MMDS cut-off rule.

66. (4) *Administrative Procedure Act.* ATEAM also argues that we failed to provide notice to the public before adoption of a new cut-off rule for MDS and MMDS applications. We disagree. We provided sufficient discussion in the *Notice of Proposed Rulemaking, Wireless Cable Order,* 5 FCC Rcd 971, 978 (1990), to alert the public that we were proposing a revised cut-off period of one day for MDS and MMDS applications. The *Notice of Proposed Rulemaking* stated as follows:

> In *OFS Order, supra,* also adopted today, we establish new criteria for determining mutual exclusivity for OFS applications, effecting a first-come, first-served filing process for OFS applications. Incompatible OFS applications will be considered mutually exclusive only if they are filed on the same day for the same frequency in the same location. In that Order, we exclude the H channels from that procedure, pending consideration of the utility of such a procedure in light of the differing filing procedures for the MDS and ITFS services. *Id.* at para. 33. We here seek comment on this issue in this proceeding. We also seek comment on the utility and propriety of such a filing procedure for the MDS service, and more generally, seek suggestions and comments on any application procedure that can be uniformly applied to two or all three of the services that are the subject of this proceeding, and whether such uniformity is particularly desirable.

Id. at 978. This *Notice of Proposed Rulemaking* was published in the *Federal Register* at 50 Fed. Reg. 7344 (March 1, 1990).

67. Nor are we persuaded that we violated the Administrative Procedure Act by failing to describe the basis for the adoption of a new cut-off rule for MDS and MMDS applications. Our adoption of the new cut-off rule was accompanied by a citation to our discussion of this same issue in the *MMDS Allocation Order,*[63] as well as stating as follows:

> The few parties who addressed the proposal in the *Notice* for MDS applications were fairly evenly divided. Commenters in support of the proposal submit that it will help ensure that only grantable applications are filed. WCA argues that the current procedures have created an incentive for insincere applicants to file competing applications to induce the legitimate wireless cable operator into a financial settlement. It asserts that mutually exclusive applications should only be considered timely-filed if they are received in a condition acceptable for filing by the close of business of the day in which the first-filed application is accepted for filing. On the other hand, some commenters assert that first-come, first-served procedures will discourage thoughtful engineering and will favor large entities with the resources necessary to mount an adequate engineering effort, thereby precluding newcomers from entering the wireless cable market.
>
> Upon review of the comments received in this proceeding, and in view of our experience, we will adopt the following filing procedure: An MDS application for a particular service area which is in a condition acceptable for filing will be mutually exclusive with any other MDS application which is in a condition acceptable for filing for the same particular service area and frequency as defined in 47 C.F.R. Sec. 21.31(a) *if* received by the Commission on the same calendar day as the first such MDS application is received by the Commission. We expect that such a change will eliminate the opportunity for application mills to "merely copy applications that have previously been filed and resubmit them with the names changed."

Wireless Cable Order, 5 FCC Rcd at 6424 (footnotes omitted.). This is sufficient to be "a concise general statement of [the] basis and purpose" of the new rule as required by 5 U.S.C. Sec. 553(c).

68. The new MDS cut-off rule was adopted to try to solve a particular problem which was diminishing the efficiency of application processing. During the fiscal years 1988 and 1989, approximately 200 MDS applications were submitted. During fiscal year 1990, approximately 6,000 MDS applications were submitted. Of these 6,000 applications, an increasing proportion appeared to "merely copy applications that ha[d] previously been filed and resubmit[ted] them with the names changed." *Wireless Cable Order,* 5 FCC Rcd at 6424, *quoting MMDS Allocation Order,* 94 FCC 2d at 1266. After the adoption of the new cut-off rule, the cut-off period does not allow sufficient time for copying and resubmission of MDS applications on the same calendar day as the first-filed application. ATEAM has not persuaded us that the Administrative Procedure Act is violated by the adoption of this new cut-off rule for MDS and MMDS applications.

69. We also find that it was lawful to make Section 21.914 effective October 31, 1990,[64] and we reject ATEAM's arguments to the contrary. As explained in the *Wireless Cable Order:*

> The shortening of the cut-off period is a procedural rule change, and therefore can be made effective on less than 30 days' notice. *See* 5 U.S.C. Sec. 553(d). In any event, we find good cause for making the rule change effective upon publication in the *Fed-*

[63] The citation that was provided appeared in footnote 73 as " *Report and Order* in Gen. Docket No. 80-112, 94 FCC 2d 1203, 1266 (1983)." A more complete quotation from the *MMDS Allocation Order* is provided at para. 61 *supra.*

[64] A summary of the Wireless Cable Order was published in the Federal Register at 55 Fed. Reg. 46006 (Oct. 31, 1990).

eral Register. By doing so we hope to avoid the filing of numerous speculative applications that would hamper our processing efforts.

5 FCC Rcd at 6441 n. 73.[65] A cut-off rule is procedural. *See Ranger v. FCC,* 294 F.2d at 244.[66]

70. Moreover, we continue to believe that, in any event, good cause exists to have made the cut-off rule effective immediately upon publication in the Federal Register. In this proceeding, we are seeking to further the public interest in wireless cable as a viable competitive alternative. We recognize that making the new cut-off rule effective upon Federal Register publication will doubtlessly preclude some entities from filing wireless cable applications. Nevertheless, we believe that the immediate effective date helps further our public interest goal of prompt development of wireless cable as a competitive alternative. At the same time, stipulation of an effective date as being upon publication, instead of a later date, does not preclude a sufficient pool of applicants. (A sizeable pool of applications, approximately 29,000, had been filed on or before the effective date of October 31, 1990. Of these 29,000, between the day adoption of the rule was announced in a press release and its effective date, approximately 6,000 applications were filed.) Moreover, while not every application filed after the effective date would necessarily be speculative, and not every one filed on that date would not be, we do believe that making the new cutoff rule effective immediately discourages the filing of numerous speculative applications. This in turn further serves the public interest by not delaying service through imposition of even more serious processing burdens on Commission staff.[67]

71. (5) *Retroactivity.* Finally, ATEAM states that we illegally made Section 21.914 retroactive by making this new rule effective for applications filed prior to October 31, 1990. We believe it is necessary to clarify what we stated in the *Wireless Cable Order* in order to dispel ATEAM's concern and confusion on this point.

72. In the order, we stated that the new rule would apply to applications filed after the effective date, October 31, 1990, and to applications filed before that date and which had not been placed on public notice. *Id.* at para. 90 n. 73.[68] In other words, those prior-filed applications would essentially be treated as filed on October 31, 1990 for cut-off purposes, and would receive cut-off protection against competitors' applications not filed by October 31, 1990.

73. The new cutoff rule, however, is not being applied retroactively. It does not "alter[...] the *past* legal consequences of past actions." *See Bowen v. Georgetown University Hospital,* 109 S.Ct. 468,477 (1988)(Scalia, J., concurring) (emphasis in original). While it may well significantly alter a prospective applicant's expectation of the timing of filing competing applications, it does not constitute retroactive rulemaking, even if "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule." *Id.* [69]

74. As an exception to the general rule concerning the effective date of this new MDS/MMDS cut-off rule, we stated that applications filed after the effective date, October 31, 1990, may be considered mutually-exclusive with an application filed before the effective date if the first-filed application was identified as accepted for filing in a public notice issued immediately before that effective date. In these particular circumstances, the application filed8. after the effective date would, as previously, continue to be subject to the former cut-off rule for MDS and MMDS applications, 47 C.F.R. Sec. 21.31(b)(2). Consistent with that provision, we said that second and subsequent conflicting applications could be filed subsequent to the effective date as long as the applications were filed in accordance with the cut-off period provided in the public notice. We thus indicated that Section 21.31(b)(2), not the newlyadopted Section 21.914, would apply to applications filed *after* October 31, 1990, as long as they were filed in accordance with the cut-off period announced by a public notice issued before October 31, 1990.[70] This meant that mutually exclusive applications could be filed during the

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[65] This quoted languagealso appears in the summary of this rulemaking order published in the Federal Register on October 31, 1990. *See* 55 Fed. Reg. at 46007-08 n. 4.

[66] On May 30, 1991, Hector Juan Figueroa filed a petition for reconsideration of the Report and Order in *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services* (1991). In a footnote in his petition, Mr. Figueroa also requested that the Commission reconsider its decision to make the MDS/MMDS cut-off rule effective October 31, 1990. This reconsideration request was made more than seven months after the decision was made on October 11, 1990. We hereby dismiss this reconsideration request as untimely. *See* 47 C.F.R. Sec. 1.429(d).

[67] Given that the cutoff rule is procedural, this extensive good cause analysis is unnecessary. Nevertheless, it does provide an understanding of why we made this procedural rule effective immediately.

[68] In response to a request by the Wireless Cable Association, we clarify the operation of this rule with regard to MDS or MMDS applications filed prior to October 31, 1990. For example, MDS Application A for location S on frequency was filed in a condition acceptable for filing on August 15, 1990. Application A did not appear on public notice before October 31, 1990. MDS Application B was filed for location T on frequency Min a condition acceptable for filing on August 20, 1990. Application B did not appear on public notice before October 31, 1990. Applications A and B have conflicts with each other which "are such that the grant of one application would effectively preclude by reason of harmful electrical interference the grant of" the other application, but have no conflicts with any additional MDS application filed earlier or later. Subsection 21.31(b)(2) applies because both applications were filed before October 31, 1990. Application A is mutually exclusive with Application B, and any other applications filed on or before October 31, 1990 for frequency M and for a location for which there would be electrical conflicts.

[69] *Cf. U.S. v. Storer Broadcasting Co.,* 351 U.S. 192, 202-03 (1956). (The FCC may adopt an eligibility requirement in a rulemaking and apply it to dismiss a pending application as ineligible.)

[70] A preliminary review of our records reveals that this potential application of the former cut-off provision is triggered by only approximately 12 applications, 8 MDS and 4 MMDS applications, which appear to be the only first conflicting applications appearing on public notice during the 60 days immediately preceding October 31, 1990.

remainder of the specified cut-off period regardless of whether it extended beyond October 31, 1990.[71] This approach served to protect the rights of parties who relied on a public notice establishing a cut-off period, as opposed to those, discussed above, who simply assumed the rules would remain unchanged in the future.

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

75. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

76. **Need and purpose of this action:** This reconsideration order revises rules governing the Multipoint Distribution Service and the Instructional Television Fixed Service, in order to simplify and update the disparate requirements applicable to Multipoint Distribution Service, Instructional Television Fixed Service, and Operational Fixed Service stations so as to facilitate wireless cable service. This action furthers the Commission's goals of encouraging the development of competitive communications systems and of promoting efficiency in the allocation, licensing and shared use of the electromagnetic spectrum.

77. **Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:** There were no comments submitted in response to the Initial Regulatory Flexibility Analysis and none in connection with this reconsideration order.

78. **Significant alternatives considered:** The Commission considered removing the licensing requirement for signal boosters. We decided to maintain the licensing requirement due to the potential for harmful interference. However, we allow pre-authorization construction and operation of signal boosters of very low power levels in prescribed circumstances.

79. The Commission also considered making ITFS licensees eligible for CARS spectrum. We decided to continue to exclude ITFS licensees generally from CARS eligibility, but we allow eligibility to the limited extent necessary to permit displacement of ITFS point-to-point operations on the E or F channels to CARS spectrum.

80. On reconsideration, it was requested that the cable television company prohibitions be rescinded. We find that these restrictions continue to be necessary to allow MDS stations to be used to compete with cable television companies. Cable television companies may still lease or own MDS or ITFS stations outside of their cable franchise areas.

81. Finally, we considered rescinding the new MDS/MMDS cut-off rule. Upon consideration, we decided the rule was adopted in a lawful manner and serves the public interest in avoiding delay and increasing the cost of introducing service to the public on MDS/MMDS channels.

82. The Secretary shall send a copy of this *Order on Reconsideration,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)).

83. The rule changes adopted here have been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose new or modified collection requirements on the public. This proposed change in the information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

IV. ORDERING CLAUSES

84. For the reasons set forth above, Parts 1, 21, 74 and 78 of the Commission's Rules ARE HEREBY AMENDED as discussed herein and as shown in Appendix B. IT IS FURTHER ORDERED that the rule changes set forth in Appendix B will become effective on December 30, 1991.

85. IT IS FURTHER ORDERED that the motion requesting stay of the effectiveness of the new MDS/MMDS cut-off rule IS DISMISSED. IT IS ALSO FURTHER ORDERED that the untimely request for reconsideration filed by Hector Juan Figueroa IS DISMISSED.

86. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303(r), and Section 1.429(i) of the Commission's Rules, 47 C.F.R. Section 1.429(i), the Petitions for Reconsideration or Clarification filed in this proceeding ARE GRANTED to the extent indicated herein, and in all other respects ARE DENIED.

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[71] Section 21.31(b) states *inter alia:*

> An application will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications only if: The application is mutually exclusive with the other application; and the application is received by the Commission in a condition acceptable for filing by whichever 'cut-off' date is earlier: Sixty (60) days after the date of the public notice listing *the first of the conflicting applications...*

(emphasis added.) Contrary to ATEAM's assertion," the first of the conflicting applications" in Section 21.31(b) is the *first* application filed among applications that are deemed to be mutually exclusive with each other. It is not the first of *subsequent* applications filed even though the mutual exclusivity arises from this subsequently-filed application. *See* 47 C.F.R. Sec. 21.31; *see also Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime Mobile),* 60 FCC 2d 549, 551 (1976). Our explanations and descriptions in the *Wireless Cable Order* and in this *Order on Reconsideration* concern only the period of time for the cut-off provisions for making an MDS/MMDS mutual exclusivity determination. There are various components of a mutual exclusivity determination made pursuant to Section 21.31, such as, electrical conflicts. These components are not changed as a result of our adoption of Section 21.914.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed petitions for reconsideration/partial reconsideration/clarification:

1. The Wireless Cable Association, Incorporated (Wireless Cable Association)
2. California Amplifier, Inc.
3. The Microband Companies Incorporated (Microband)
4. The Archdiocese of Los Angeles Education and Welfare Corporation and the Diocese of San Bernardino (L.A.)
5. Arizona Board of Regents on Behalf of Arizona State University, Board of Trustees, Community-Technical Colleges of Connecticut, Boston Catholic Television Center, Inc., Connecticut public Broadcasting, Inc., Mississippi Authority for Educational Television, Oregon Public Broadcasting, Santa Clara County Board of Education and WHYY, Inc. (Arizona)
6. The Association for Higher Education of North Texas, Catholic Television Network, Indiana Higher Education Telecommunication System, Illinois Institute of Technology, Northeastern University, Region IV Education Service Center, The Trustees of Leland Stanford Junior University, Transvideo Communications, Inc. and The University of Texas Health Science Center (Texas)
7. The Board of Regents of the University of Wisconsin System, Iowa Public Broadcasting Board, South Carolina Educational Television Commission, State of Wisconsin - Educational Communications Board, and University of Maine System (Wisconsin)
8. The Department of Education, Archdiocese of New York (N.Y.)
9. Telemedia Engineering and Management, Inc., Ita Marie Dunkle, Mike McGill, Roy Nakamura, Javed Qasim, and United States Independent Microwave Television Association (ATEAM)
10. North America Catholic Educational Programming Foundation, Inc., Network for Instructional TV, Inc. and Educational Service Center Region XIII, Supreme Cable Company, Inc. (Educational Foundation)
11. Tribune Regional Programming, Inc.
12. Communications-Link
13. Atlanta Interfaith Broadcasters, Inc. (Atlanta)

The following party filed an opposition to petitions for reconsideration/partial reconsideration/clarification:

1. The Wireless Cable Association, Inc. (Wireless Cable Association)

The following parties filed replies to the opposition to petitions for reconsideration/partial reconsideration/clarification:

1. Applied Telemedia Engineering and Management, Inc., et al (ATEAM)
2. The Association for Higher Education of North Texas, et al
3. Tribune Regional Programming, Inc.

APENDIX B

Parts 1, 21, 74 and 78 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 1 - Practice and Procedure

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4,303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

Subpart G - Schedule of Statutory Charges and Procedures for Payment

2. The authority citation for Subpart G of Part 1 continues to read as follows:

Authority: Sec. 3001(a), Pub. L. 101-239,103 Stat. 2106, 47 U.S.C. 158.

3. Section 1.1105, is amended by adding subparagraph (7)(h) to read as follows:

Action	FCC Form No.	Fee Amount	Fee Type Code	Address
h. MDS Signal Booster				Federal Communications Commission,
(i) Application	494	$50	CSB	
(ii) Certification of Completion of Construction	494A	$50	CCB	Common Carrier Domestic Radio, P.O. Box 258155 Pittsburgh PA 15251-5155

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PART 21 - Domestic Public Fixed Radio Services

4. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 602; 47 U.S.C. 552.

5. Section 21.901(d) is amended by removing and reserving subparagraph (1).

6. Section 21.902 is amended by revising paragraph (f)(2), redesignating subparagraph (i) as (j), by redesignating subparagraph (j) as (k), and by adding subparagraph (i), to read as follows:

Sec. 21.902. Frequency interference.

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(f) ***

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 0 dB. In the alternative, harmful interference will be considered present for an Instructional Television Fixed Service (ITFS) station constructed before May 26, 1983, when a free space calculation determines that this ratio is less than 10 dB, unless the license for a Multipoint Distribution Service station in the 2596-2690 MHz frequency band is conditioned on the proffer to the affected ITFS station licensee of equipment capable of providing a ratio of O dB or more at no expense to the ITFS station licensee, and also conditioned, if necessary, on installation of such equipment, absent a showing by the affected ITFS station licensee demonstrating good cause and that the proposed equipment will not provide a ratio of 0 dB or more or that installation of such equipment, at no expense to the ITFS station licensee, is not possible.

*****

(i)(1) For each application for facilities in the 2596-2644 MHz frequency band filed on or after December 30, 1991, the applicant must submit an analysis demonstrating that operation of the applicant's transmitter will not cause harmful interference to any existing E-channel or F-channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized, with a transmitter site within 50 miles of the coordinates of the Multichannel Multipoint Distribution Service (MMDS) station's proposed transmitter site.

(A) In the alternative, an applicant for an MMDS station may submit a statement from the ITFS licensee or construction permittee stating that the ITFS licensee or construction permittee does not object to operation of the MMDS station.

(B) In the alternative, an applicant for an MMDS station may submit an analysis demonstrating that there are no ITFS licensees or construction permittees as described in (i)(1) of this paragraph within 50 miles of the coordinates of the proposed transmitter site of the MMDS station.

(2) For each application described in (i)(1) of this paragraph, the applicant must file the required analysis on or before the 60th day after public notice.

(A) For MMDS applications which participate in a lottery, this public notice described at (i)(2) of this paragraph is the notice announcing the selection of the applicant's application by lottery for qualification review.

(B) For MMDS applications which do not participate in a lottery, this public notice described at (i)(2) of this paragraph is the notice announcing that the applicant's application is not mutually-exclusive with other MMDS applications.

(3) For each application described in (i)(1) of this paragraph, the applicant must serve, by certified mail, return receipt requested, on or before the day the analysis described in (i)(1) of this paragraph must be filed with the Commission, a copy of the analysis described in (i)(1) of this paragraph, on each ITFS licensee or construction permittee described in (i)(1) of this paragraph.

(4) For each application described in (i)(1) of this paragraph, the applicant must file with the analysis described in (i)(1) of this paragraph a certificate of service of the analysis as described in (i)(3) of this paragraph;

(5) For each application described in (i)(1) of this paragraph, the applicant must file, on or before the 120th day after the public notice as described in (i)(2) of this paragraph, a written notice which contains the following:

(A) caption -- ITFS Service Notice;

(B) applicant's name, address, proposed service area and channel group;

(C) a list of each ITFS licensee and construction permittee described in (i)(1) of this paragraph;

(D) a list of the date each ITFS licensee and construction permittee described in (i)(1) of this paragraph received a copy of the analysis described in (i)(1) of this paragraph, or a notation of lack of receipt by the ITFS licensee or construction permittee of a copy of the interference analysis on or before such 120th day, together with a description of its efforts for receipt by each such licensee or construction permittee lacking receipt of the analysis.

(6)(A) Notwithstanding the provisions of Secs. 1.824(c) and 21.30(a)(4), for each application described in (i)(1) of this paragraph, any ITFS licensee and any ITFS construction permittee described in (i)(1) of this paragraph may file with the Commission on or before the 120th day after the public notice described in (i)(2) of this paragraph, a petition to deny the MMDS application.

(B) Except for the requirements as to the filing time deadline, this petition to deny must otherwise comply with the provisions of Sec. 21.30.

(C) In addition, this ITFS petition to deny must:

(i) identify the subject MMDS application, including the applicant's name, station location, channel group, and application file number;

(ii) include a certificate of service demonstrating service on the subject MMDS applicant by certified mail, return receipt requested, on or before the 120th day after the MMDS public notice described in (i)(2) of this paragraph;

(iii) include a demonstration that it made efforts to reach agreement with the MMDS applicant but was unable to do so;

(iv) include an engineering analysis that operation of the proposed MMDS station will cause harmful interference to its ITFS station;

(v) include a demonstration, in those cases in which the MMDS applicant's analysis is dependent upon modification(s) to the ITFS facility, that the harmful interference cannot be avoided by the proposed substitution of new or modified equipment to be supplied and installed by the MMDS applicant, at no expense to the ITFS licensee or construction permittee; and

(vi) be limited to raising objections concerning the potential for harmful interference to its ITFS station or concerning a failure by the MMDS applicant to serve the ITFS licensee or construction permittee with a copy of the interference analysis described in (i)(1) of this paragraph.

(D) The Commission will presume an ITFS licensee or construction permittee described in (i)(1) of this paragraph has no objection to operation of the MMDS station, if the ITFS licensee or construction permittee fails to file a petition to deny by the deadline prescribed in (i)(6)(A) of this paragraph.

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7. Section 21.913 is amended by adding paragraph (g) to read as follows:

Sec. 21.913. Signal booster stations.

*****

(g) However, an MDS, MMDS, or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and which does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for 60 days after authorization no objection or petition to deny is filed by an authorized cochannel or adjacentchannel ITFS, MDS, or MMDS station with a transmitter within 5 miles of the coordinates of the primary transmitter of the signal booster, if:

(1) an application on Form 494 or Form 330, with the required filing fee, is filed with the Commission within 48 hours of installation;

(2) such application includes a certification that the maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(3) such application includes a description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(4) such application includes a certification that no registered receiver of an ITFS E or F channel station, constructed prior to May 26, 1983, is located with a 1 mile radius of the coordinates of the booster, or in the alternative, a consent statement from the affected ITFS licensee;

(5) such application includes a certification that no environmental assessment location as defined at Section 1.1307 of this Chapter is affected by installation and/or operation of the signal booster;

(6) such application includes a certification of service of this application on each MDS, MMDS, and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile radius of the coordinates of the booster;

(7) such application includes a consent statement from each MDS, MMDS, or ITFS station licensee whose signal is repeated by the signal booster;

(8) such application includes a demonstration that the proposed signal booster site is within the protected service area of the MDS/MMDS station, if the signal of an MDS or an MMDS station is repeated;

(9) such application includes a demonstration that the power flux density at the edge of the MDS station's protected service area does not exceed -75.6 dBW/m^2, if the signal of an MDS station is repeated;

(10) such application includes a certification that the antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(11) such application includes a certification that the MDS, MMDS, or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission and must not recommence operation until receipt of written authorization to do so by the Commission.

8. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4,303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

9. Section 74.903 is amended by revising subparagraph (a)(2) in its entirety, adding subparagraph (b)(5), and adding paragraphs (d) and (e) to read as follows:

Sec. 74.903 Interference.

*****

(a) * * *

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the output of a reference receiving antenna oriented to receive the maximum desired signal level. Harmful interference will be considered present when a free space calculation determines that this ratio is less than 0 dB. In the alternative, harmful interference will be considered present for an Instructional Television Fixed Service (ITFS) station constructed before May 26, 1983, when a free space calculation determines that this ratio is less than 10 dB, unless the individual receive site under consideration has been subsequently upgraded with up-to-date reception equipment, in which case the ratio shall be less than 0 dB, or unless the license for an ITFS station is conditioned on the proffer to the affected ITFS station licensee of equipment capable of providing a ratio of 0 dB or more at no expense to the affected ITFS station licensee, and also conditioned, if necessary, on installation of such equipment, absent a showing by the affected ITFS station licensee demonstrating good cause and that the proposed equipment will not provide a ratio of 0 dB or more or that installation of such equipment, at no expense to the ITFS station licensee, is not possible. Absent information presented to the contrary, the Commission will assume that reception equipment installation occurred simultaneously with original station equipment.

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(b) * * *

(5) An analysis of the potential for harmful interference within the protected service area, as defined at Sec. 21.902(d) of this chapter, of any authorized or previously-proposed station(s) described at paragraph (d) of this section.

*****

(d) Each authorized or previously-proposed applicant, construction permittee, or licensee who proposes to lease excess capacity to a "wireless cable" operator pursuant to Section 74.931(e)(2) must be protected from harmful electrical interference for the hours of such transmissions within a protected service area as defined at Section 21.902(d) of this chapter. Applicants are expected to cooperate fully and in good faith with an authorized or previouslyproposed applicant, construction permittee, or licensee who leases or proposes to lease excess capacity to a "wireless cable" operator pursuant to Section 74.931(e)(2), in attempting to resolve problems of potential interference to such operations before bringing the matter to the attention of the Commission.

(e) Each ITFS applicant, permittee, or licensee who wishes to claim the protection described at subsection (d) of this paragraph must request such protection in writing in its initial application for a new station, in an application amendment, or by modification application.

10. Section 74.931 is amended by revising paragraph (e) to read as follows:

*****

(e) A licensee may use excess capacity on each channel to transmit material other than the ITFS subject matter specified in paragraphs (a), (b), (c), and (d) of this section subject to the following conditions:

(1) If the time or capacity leased is not to be used for "wireless cable" operations, the licensee must preserve at least 40 hours per week, including at least 6 hours per weekday (Monday through Friday), excluding holidays and vacation days, for ITFS purposes on that channel. The 40-hour preservation may consist of airtime strictly reserved for ITFS use and not used for non-ITFS programming, or of time used for non-ITFS programming but subject to ready recapture by the licensee for ITFS use with no economic or operational detriment of the licensee. At least 20 hours per week of the preserved time on each channel must be used for ITFS programming, including at least 3 hours per weekday, excluding holidays and vacation days, except as provided in (e)(3) of this paragraph. Only ITFS programming and preserved airtime scheduled between 8:00 a.m. and 10:00 p.m. Monday through Saturday, will qualify to meet these requirements.

(2) If the time or capacity leased is to be used for "wireless cable" operations, before leasing excess capacity on any one channel, the licensee must provide at least 20 hours per week of ITFS programming on that channel, except as provided in (e)(3) of this paragraph. All hours not used for ITFS programming may be leased to a "wireless cable" operator. An additional 20 hours per week per channel must be reserved for recapture by the ITFS licensee for its ITFS programming, subject to one year's advance, written notification by the ITFS licensee to its "wireless cable" lessee. These hours of recapture are not restricted as to time of day or day of the week, but may be established by negotiations between the ITFS licensee and the "wireless cable" lessee.

(3) For the first two years of operation, an ITFS entity may lease excess capacity if it provides ITFS programming at least 12 hours per channel per week, including up to four hours of ITFS usage per day.

(4) The licensee may schedule the ITFS programming and use automatic channel switching equipment so as to employ channel mapping technology to lease to a "wireless cable" operator. However, an ITFS applicant should request only as many channels as it needs to fulfill its educational requirements.

(5) All of the capacity available on any subsidiary channel of any authorized channel may be used for the transmission of material to be used by others.

(6) When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation. A licensee operating as a common carrier is required to apply for the appropriate authorization and to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is common carriage

rests with the ITFS licensee. Initial determinations by the licensees are subject to Commission examination and may be reviewed at the Commission's discretion.

(7) An ITFS applicant, permittee, or licensee may use anomnidirectional antenna to facilitate the leasing of excess capacity to "wireless cable" operators.

(8) Leasing activity may not cause unacceptable interference to cochannel and adjacent-channel operations.

* * * * *

11. Section 74.985 is revised in its entirety to read as follows:

Sec. 74.985. Signal booster stations.

(a) Authorizations for Instructional Television Fixed Service (ITFS) booster stations may be granted to an ITFS applicant, permittee or licensee, or to a third party with a fully-executed lease agreement with an ITFS applicant, permittee, or licensee. The eligibility requirements of Sec. 74.932 will not apply to such third-party booster station applicants. A signal booster station may not extend service beyond a registered receive site of the primary ITFS station. No booster station may be authorized for the retransmission of signals from an MDS, MMDS, or ITFS station without the written consent of the licensee of the station whose signals are retransmitted.

(b) In addition to the other application requirements of this Part and of Form 330, each application for a signal booster station that would retransmit an ITFS signal must include a demonstration that the proposed signal booster station will not transmit a signal to a receiver site that is beyond a previously-registered receive site of the primary ITFS station.

(c) In addition to the other application requirements of this Part and of Form 330, each application for a signal booster station that would retransmit an ITFS signal must include a demonstration that the power flux density of the ITFS signal does not exceed -75.6 dBW/m^2 at the edge of a protected service area for the primary ITFS transmitter station, as defined by Sec. 21.902(d) of this chapter.

(d) In addition to the other application requirements of this Part and of Forms 494 and 330, each application for a signal booster station must include a demonstration that the proposed signal booster station will cause no harmful interference to cochannel or adjacent-channel, authorized or previouslyproposed ITFS, MDS, or MMDS, stations with transmitters within 50 miles of the proposed booster station's transmitter site.

(e) In addition to the other application requirements of this Part and of Forms 494 and 330, each application for a signal booster station must include a written consent statement of the licensee of each MDS, MMDS, and ITFS station whose signal is retransmitted.

(f) The output power of the signal booster transmitter station must not exceed 18 dBW EIRP.

(g) However, an MDS, MMDS, or ITFS licensee may install and commence operation of a signal booster station that has a maximum power level of -9 dBW EIRP and which does not extend service beyond the boundaries of an MDS station's protected service area or beyond an ITFS licensee's registered receive site, subject to the condition that for 60 days after authorization no objection or petition to deny is filed by an authorized cochannel or adjacentchannel ITFS, MDS, or MMDS station with a transmitter within 5 miles of the coordinates of the primary transmitter of the signal booster, if:

(1) an application on Form 494 or Form 330, with the required filing fee, is filed with the Commission within 48 hours of installation;

(2) such application includes a certification that the maximum power level of the signal booster transmitter does not exceed -9 dBW EIRP;

(3) such application includes a description of the signal booster technical specifications (including antenna gain and azimuth), the coordinates of the booster and receivers, and the street address of the signal booster;

(4) such application includes a certification that no environmental assessment location as defined at Section 1.1307 of this Chapter is affected by installation and/or operation of the signal booster;

(5) such application includes a certification of service of this application on each MDS, MMDS, and/or ITFS station licensee with protected service areas or registered receivers within a 5 mile radius of the coordinates of the booster;

(6) such application includes a consent statement from each MDS, MMDS, or ITFS station licensee whose signal is repeated by the signal booster;

(7) such application includes a demonstration that the proposed signal booster site is within the protected service area of the MDS/MMDS station, if the signal of an MDS or an MMDS station is repeated;

(8) such application includes a demonstration that the proposed signal booster site will not transmit a signal to a receiver site that is beyond a previously-registered receive site of the primary ITFS station, if the signal of an ITFS station would be repeated.

(9) such application includes a demonstration that the power flux density of the ITFS signal does not exceed -75.6 dBW/m2 at the edge of a protected service area for the primary ITFS transmitter station, as defined by Sec. 21.902(d) of this chapter.

(10) such application includes a certification that the antenna structure will extend less than 6.10 meters (20 feet) above the ground or natural formation or less than 6.10 meters (20 feet) above an existing manmade structure (other than an antenna structure); and

(11) such application includes a certification that the MDS, MMDS, or ITFS licensee understands and agrees that in the event harmful interference is claimed by the filing of an objection or petition to deny, the licensee must terminate operation within two (2) hours of written notification by the Commission and must not recommence operation until receipt of written authorization to do so by the Commission.

PART 78 -- CABLE TELEVISION RELAY SERVICE

12. The authority citation for Part 78 continues to read:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 307, 308, 309.

13. Section 78.13 is amended by adding paragraph (e) to read as follows:

Sec. 78.13 Eligibility for license.

* * * * *

(e) Licensees, construction permittees, and applicants of channels in the Instructional Television Fixed Service (ITFS) as defined in Section 74.901 if:

(1) the station is authorized or the application proposes authorization as a point-to-point operation; and

(2) grant of a CARS license would allow displacement of any E or F channel of the ITFS point-to-point operation by a Multipoint Distribution Service (MDS) or Multichannel Multipoint Distribution Service (MMDS) applicant, conditional licensee, or licensee.

Separate Statement of
Commissioner James H. Quello

RE: Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service (GEN Docket Nos. 90-54 and 80-113).

The survival and growth of the Instructional Television Fixed Service (ITFS) is necessary to accommodate the educational needs of our society. The education of Americans is no longer confined to the classroom. ITFS programming is available to a variety of locations within an ITFS licensed community and at odd hours of the day seven days a week. Certainly, ITFS programming continues to contribute to the traditional classroom learning environment.

Today, Americans identify education as one of the most significant issues facing our country. In a limited, but very important way, the Federal Communications Commission continues to play an important role in assuring that opportunities exist for those willing to make the investment in the Instructional Television Fixed Service.

Critics argue that ITFS is not fully utilizing its spectrum allotment resulting in valuable spectrum remaining fallow. In todays market, there are significant demands for this spectrum; however, the value of education cannot be underestimated.

We must review carefully proposed alternative uses of ITFS spectrum. One only has to look at the evolution of non-commercial educational broadcasting as an example. The forethought of the Commission to set aside broadcast frequencies for non-commercial educational use assured that educational broadcasting would have a spectrum home even in today's market where there are many competing demands for broadcast spectrum. Third Notice of Further Proposed Rulemaking of Television Assignments, 16 FR 3072, 3079 (March 22, 1951). Educational broadcasting developed more slowly than its commercial counterparts due in part to the differing funding mechanisms. A parallel can be drawn between the development of non-commercial educational broadcasting and the development of ITFS services. The slow growth of ITFS should not be an indicator of lack of interest on the part of educators. Often, the growth of ITFS, like its educational broadcast counterparts, suffers from the lack of consistent and secure funding.

Today, we have competing demands for ITFS spectrum particularly by the multipoint distribution service (MDS). To facilitate the growth of ITFS and to provide the possibility of additional channels for MDS operators, the Commission allowed ITFS licensees to lease excess channel capacity to MDS licensees. 47 C.F.R. Section 74.931 (e) and Second Report and Order in MM Docket No. 83-523, 101 FCC 2d 50, 87,90-91 (1985). This leasing arrangement provides revenues to ITFS licensees and facilitates the further development of ITFS services. MDS operators also benefit from these leasing arrangements by providing customers more channel selection. Consumers benefit by having access to ITFS programming and in cabled markets, where there is an MDS operation, they now have a competitive multichannel video provider. I supported then, as I do now, the opportunity for ITFS licensees to lease excess channel capacity. I believe our rules provide a delicate balance between the needs of ITFS licensees and MDS operators.

Generally, I support today's actions. I seek to assure the carefully crafted balance between ITFS and MDS needs remains intact. I support the repeal of the time requirements ITFS licensees had to program ITFS material in order to qualify for the 20 hour per-channel per-week requirement. This rule was important initially to assure that legitimate ITFS applicants were providing educational/instructional services at times when students were most likely to be in the audience. Now that many ITFS licensees are operating and providing important instructional services, I believe that licensees should have the flexibility to determine when to air ITFS programming. I recognize the tremendous commitment to education made by ITFS licensees, nevertheless, I would like to caution ITFS operators against programming the majority of their ITFS services when students are least likely to be in the audience. Additionally, an ITFS licensee using valuable spectrum solely for down loading programming for videotaping thereby allowing for more convenient viewing would, in my opinion, be failing as an ITFS licensee.

I concur with today's action allowing for involuntary station modifications. Generally, I have serious concerns about involuntary station modifications, however, in this proceeding I believe we are providing sufficient safeguards. The more appropriate approach to resolving technical conflicts is to have ITFS and MDS licensees resolve their differences. Unfortunately, I recognize there will be times when agreement cannot be reached and the Commission may become involved. Nonetheless, if involuntary modifications are made, then such modifications should benefit the ITFS licensee. I am troubled by the very nature of involuntary modifications. To allow licensees in one service to seek FCC authority to modify the facilities of licensees in another service without the consent of the licensee

whose facility is being modified is unique. Although the Commission must approve the modification request, this approach runs counter to our well established rules and policies regarding licensee control over their facilities, and, I am concerned that the Commission is breaking new ground.

I accept that portion of today's action that provides a 15 mile protection contour for ITFS licensees' non-ITFS programming to the extent such protection does not preclude new ITFS entrants. I recognize the benefit this protection provides to MDS operators whose service receives a 15 mile protected contour and who may be leasing excess ITFS channel capacity. Changing the rules to allow such protection for non-ITFS programming on ITFS facilities has the potential of precluding new ITFS entrants. I am reminded that this is spectrum allocated to the ITFS service and our actions should not thwart the development of new ITFS systems.

Finally, there is the issue of allowing MDS operators to be licensed on ITFS spectrum. I do not mind MDS access to ITFS channels when there is at least 8 available ITFS channels in a community. My concern focuses on the rights ITFS applicants or licensees have to recapture ITFS channels licensed to MDS operators when previously available ITFS channels are licensed and are no longer available. Will ITFS applicants have the right to apply for the ITFS channels used by MDS operators? I believe they should have a this right. To prohibit new ITFS applicants from accessing ITFS channels licensed to MDS operators results in reallocation of ITFS spectrum. The net result of today's action is to reduce the amount of spectrum available to ITFS entities. Additionally, today's action authorizes MDS entities in the ITFS service on a shared basis and I am concerned that this is just the beginning of a long series of battles to capture ITFS spectrum away from its intended educational use. Therefore, I dissent to this portion of the item. I recognize the problem this presents to MDS operators as well as potential ITFS applicants. One possible approach would be to allow MDS operations on ITFS frequencies on a secondary basis and to provide a reasonable transition period from MDS operations to ITFS upon the Commission awarding an ITFS license to a qualified applicant. The majority's position recognizes the needs of potential ITFS licensees, however, I am concerned the long-term effect of providing co-primary status to MDS operators on ITFS spectrum will diminish the ITFS service. Such action, in my opinion, disrupts the delicate balance previously crafted to meet the needs of both ITFS and MDS licensees.

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Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHZ Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service

I wholeheartedly endorse the measures that the Commission adopts in this Order on Reconsideration, and in the companion Second Report and Order, to help wireless cable operators become true competitors to traditional cable systems.

The Commission has repeatedly stressed the point made in our Cable Report to Congress in July 1990: that robust competition, not reregulation, offers the best long-term answer to rising cable rates and customer service problems. We shall be particularly eager, therefore, to encourage wireless cable.

At a meeting of the Wireless Cable Association in Denver last July, I said that of all the emerging alternatives to traditional cable, wireless cable appears today to be the best. Why? Because it is easier and less expensive to get up and running. Because the nascent wireless cable industry has proven, impressively, its power to overcome formidable real-world obstacles. And because wireless cable is here, now, available--ready to compete today.

Some may argue that the Commission could have gone even further in its efforts to help the wireless cable industry, perhaps by allowing MMDS operators to expand their protected contours or by permitting greater MMDS use of currently vacant ITFS spectrum. But the Commission must balance carefully the needs of the wireless cable industry against the equally important needs of educational television services. And we cannot ignore the interests of future ITFS operators and applicants. As a regulator and strong supporter of President Bush's education initiative, AMERICA 2000, I intend to do all I can to encourage and promote the educational uses of television.

I believe that both items we adopt today reflect a prudently balanced approach to the serious needs of two important and

developing services. They are, incidentally, a tribute also to Chairman Sikes's ability to accommodate the concerns of colleagues and to craft solutions in the face of seemingly intractable problems. Although it is all too easy to talk about winners and losers when competing interests vie for limited spectrum, the FCC is not in the business of playing favorites among industries or protecting any one industry. We work for viewers and consumers, not industries. In this item the Commission expresses its belief that the public will benefit from both the wireless industry's enhanced ability to compete with cable, and its ability to provide financing for ITFS operators.

The most interesting aspect of this balancing effort, in my judgment, is the growing convergence between the wireless cable industry and educational television. That convergence serves the interest of both groups -- and serves the larger public interest. Wireless cable's addressable technology and marketing skills will help to bring new and exciting educational programming, including credit courses, into homes. Educators and wireless cable operators may be able to make special arrangements that enhance localism, the public interest, and the future of television. The Commission has attempted to encourage such convergence by allowing more flexible scheduling requirements for ITFS operators rather than limiting the programming hours that can be counted towards the twenty-hour-per channel minimum programming requirement or the forty-hour-per channel reservation requirement.

Finally, I want to underscore that there is much more that the FCC must do, beyond the scope of these rulemakings, to encourage the expansion of both wireless cable and ITFS operators. Now that we have addressed the legal and technical standards issues affecting these services, we need to tackle the equally difficult job of expediting our processing of MMDS and ITFS applications and establishing a speedy, "one-stop shopping" mechanism to enable <u>all</u> new entrants to enhance competition in the communications marketplace.

The wireless cable industry as well as the FCC have suffered at the hands of the MMDS application mills, which produced more than 12,000 MMDS applications in the past year alone. I have recently learned that the licensing staff of the Common Carrier Bureau has been focusing its efforts for the past nine months on conducting MMDS lotteries and processing these applications, rather than processing the few individual modification and extension applications of existing licensees who are actually attempting to start wireless cable systems. I believe we need to alter our priorities, and I will do all that I can to ensure that the small number of pending applications and other licensing determinations to get wireless systems up and running are given expedited treatment by both the Common Carrier and Mass Media Bureaus.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-54

In re

Amendment of Parts 21, 43, 74,
78, and 94 of the Commission's
Rules Governing Use of the
Frequencies in the 2.1 and 2.5 GHz
Bands Affecting:

Private Operational-Fixed
Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint
Distribution Service,
Instructional Television
Fixed Service, and
Cable Television Relay Service

SECOND REPORT AND ORDER

Adopted: September 26, 1991; Released: October 25, 1991

By the Commission: Commissioner Quello approved, concurring in part, dissenting in part and issuing a statement; Commissioner Barrett issuing a statement.

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APPENDIX D (H-Channel Transition)	

I. INTRODUCTION

1. Wireless cable is a multichannel video service that is similar to cable television in the type of programming it provides, but differs from cable in that it uses microwave radio channels rather than hardwire to transmit that programming to subscribers. We initiated this proceeding to review and simplify disparate technical, procedural, ownership and other requirements and restrictions in the three microwave radio services used in the provision of wireless cable service -- Multipoint Distribution Service (MDS),[1] Private Operational-Fixed Service (OFS), and Instructional Television Fixed Service (ITFS).[2] *See Notice of Proposed Rule Making and Notice of Inquiry* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 971 (1990).[3] By affording wireless cable operators a more accommodating regulatory framework, we aim to enhance the potential of wireless cable as a competitive force in the multichannel video distribution marketplace. At the same time, our underlying concern has been and remains "the critical importance of education, and the significant role that ITFS can play in providing improved educational opportunities for all."[4] We thus remain committed to "not jeopardize the current or future ability of ITFS to fulfill its primary intended purpose of providing educational material for instructional use."[5]

2. On October 26, 1990, the Commission released a *Report and Order* (*see* note 5, *supra)* that resolved most of the issues in this proceeding. The *Report and Order* increased the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying various rules governing the application process, the initiation of service on new channels, and the modification of existing operations. The *Report and Order* also modified equipment standards and

[1] In this *Second Report and Order,* "MDS" will generally be used to refer collectively to single-channel ("MDS") and multiple-channel ("MMDS") multipoint distribution service. The use of "MMDS" will specifically refer to that individual service in those cases where the distinction is significant. Single-channel MDS will be referred to as such, where appropriate.

[2] There are 12 or 13 channels available for wireless cable full-time. Eleven of these are MMDS Channels E1-E4 and F1-F4, and Channels H1-H3, reallocated herein (*see* paras. 7-10, *infra).* In 50 cities, two single-channels MDS channels are also available, Channels 1 and 2. In the rest of the country, one single-channel MDS channel (Channel 1) is available. In addition, 20 ITFS channels, Channels A1-A4, B1-B4, C1-C4, D1-D4 and G1-G4, may be leased by wireless cable operators on a parttime basis (more than 75% of ITFS channel time could be leased, depending upon the intensity of use by the ITFS licensee). By use of the term wireless cable we do not imply that the service constitutes cable television service for any statutory or regulatory purpose. *See Report and Order* in MM Docket No. 89-35, 5 FCC Rcd 7638 (1990) (wireless cable not within the definition of a cable television system).

[3] General Docket No. 90-54 also includes issues raised and comments filed in PR Docket No. 88-191, which was terminated by action of February 8, 1990. *Report and Order* in PR Docket No. 88-191, 5 FCC Rcd 1220.

[4] *Further Notice of Proposed Rule Making* in Gen. Docket No. 90-54, 5 FCC Rcd 6472 (1990).

[5] *Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410 (1990).

other technical requirements to increase service capabilities and improve the quality of various aspects of wireless cable service. Finally, the *Report and Order* relaxed certain administrative requirements. We expect that these changes will strengthen wireless cable service as a multichannel competitor to cable television service, while protecting the viability of ITFS as a significant educational tool.[6]

3. Certain aspects of the issues raised in the *Report and Order*, as well as some additional issues, required further consideration, for which we solicited further comment.[7] In a *Further Notice of Proposed Rule Making* (*Further Notice*) (*see* note 4, *supra*) , we sought comment regarding (1) reallocation of the OFS H channels to MDS; (2) allocation of MDS, OFS and ITFS response channels; (3) involuntary station modifications, including involuntary colocation; (4) certain modifications for colocation without prior Commission authorization; (5) involuntary migration of point-to-point ITFS operations on the E and F channels;(6) ownership or operation of wireless cable facilities by cable entities; and (7) use of available ITFS channels by wireless cable entities. A list of commenters is attached as Appendix B.

4. This *Second Report and Order* addresses and resolves each of these issues, adopting most of the proposals presented in the *Further Notice*, and concluding this rule making. We believe that the new rules strike an appropriate balance among the significant competing interests involved and well-serve the overall public interest. As explained further below, we reallocate the three OFS H channels to MDS (Section II-A). The response channels associated with the H channels will80remain allocated to OFS; we also reallocate half of the MDS response channels to OFS, as proposed, except those specific channels already in use by MDS systems. The commenters have persuaded us, however, to abandon our proposal to reallocate 25 percent of the ITFS response channels to OFS. All of the ITFS response channels will remain allocated to ITFS (Section II-B). In addition, this *Second Report and Order* delineates the procedures an applicant should use to initiate an involuntary station modification, including colocation, in certain specific circumstances (Section II-C). We also decline to permit modifications to facilitate colocation withoutprior Commission authorization (Section II-D), and we provide guidelines under which involuntary point-to-point migration proposals will be reviewed (Section II-E). This *Second Report and Order* also establishes a rural exemption to the prohibition of cable ownership and leasing of wireless cable systems, and an exemption for the provision of local programming, subject to guidelines (Section II-F). Finally, this *Second Report and Order* adopts a modified version of our proposal to permit use of available ITFS channels by wireless cable entities (Section II-G).

5. This rule making has generated extensive comment from ITFS entities throughout its course. In response to those comments, we have carefully considered the consequences to ITFS of each of our proposed rule and policy changes. In some situations, we have rejected proposals that would substantially benefit wireless cable because of their potentially negative impact on ITFS. As we have emphasized throughout this proceeding, we are committed to the further development of ITFS. It is our intention to provide the opportunity for distance learning to become commonplace in American classrooms, and we believe that the rule and policy changes adopted here will not only protect the interests of ITFS licensees, but will also further enhance ITFS service. For example, in Section II-G, we permit wireless cable entities to apply for available ITFS channels in areas where there is currently little or no ITFS usage. We anticipate that this provision will lead to the development of more and stronger ITFS systems due to our requirement that the wireless cable entity either provide an ITFS entity access to its ITFS facilities or contribute to the construction of an ITFS system on other available ITFS channels. Thus, a local educator that is currently unable to establish an ITFS system on its own may be able to initiate a system with the assistance of a wireless cable operator. At the same time, we are committed to furthering competition in the multichannel video distribution marketplace by increasing system capacity where spectrum is available and its use can be coordinated with ITFS use. The rule and policy changes adopted in this proceeding should optimize these pursuits while protecting and enhancing current and future ITFS service.

II. DISCUSSION

A. Reallocation of H Channels

6. **Background/Proposal.** The *Further Notice* proposed that the OFS H channels be reallocated to MDS, as the vast majority of current H-channel operations are MDS-type operations. We noted that reallocation would simplify matters for operators and the Commission by conforming H-channel procedural rules, as well as operating and interference protection standards, to those of the MDS service. We also sought comment on whether current H-channel licensees or applicants should be

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[6] The *Report and Order* adopted the following specific rule changes: (1) eliminating the MDS multiple ownership restrictions; (2) facilitating modifications to reduce interference for existing MDS stations, thereby accelerating the introduction of service on additional channels; (3) changing procedures for notifying ITFS licensees of a proposed MDS station or station modification; (4) allowing MDS applicants to invoke the 0 dB interference standard at older ITFS sites where the MDS applicant will provide new equipment capable of operation at that interference level; (5) permitting migration of point-to-point ITFS operations grandfathered on the MDS E and F channels; (6) relaxing some restrictions on the leasing of ITFS excess capacity; (7) prohibiting conventional cable operators from holding licenses or leases for MDS or ITFS facilities in their franchise areas; (8) increasing permissible power limits and modifying the output power standard; tightening transmitter performance standards for new stations, including (9) tightening out-of-band emissions and (10) revising permissible aural power levels; (11) providing for the use of signal boosters to fill in areas within the protected service area that lack line-of-sight; (12) authorizing wireless cable operators to use auxiliary frequencies and the cable antenna relay service (CARS) band where necessary; and (13) revising certain administrative requirements, such as establishing a same-day cutoff for MDS applications.

[7] In addition, we received several petitions for reconsideration of the *Report and Order*. These will be resolved in a separate Order on Reconsideration.

grandfathered and, if so, whether grandfathered OFS stations should be permitted to remain OFS stations after assignment or transfer.

7. **Comments.** Commenters overwhelmingly agree that the H channels should be reallocated to the MDS service. They assert that there appears to be no usage of the H channels that cannot be accommodated under the Part 21 rules. They also contend that reallocation will greatly simplify matters for the wireless cable industry by assuring consistency of rules, processing procedures and personnel, and will involve little or no additional expense for OFS operators. On the other hand, one commenter submits that spectrum is scarce in these bands and "should not be wasted on yet another video entertainment medium."[8]

8. Commenters are divided on whether existing OFS operations on the H channels should be grandfathered. Proponents argue that grandfathering would not impair wireless cable service because it would not affect OFS licensees already in the wireless cable business. Opponents argue that grandfathering would significantly reduce the benefits to be realized by combining the MDS and OFS H channels under a single regulatory system, especially since some of the changes adopted in the *Report and Order* apply only to MDS and not OFS. Some commenters assert that if wireless cable service represents the best use of the stations, the marketplace will supply sufficient incentives for operators to voluntarily convert the stations to MDS, so grandfathering is unnecessary. Some commenters also submit that current ITFS uses of the H channels should be grandfathered.

9. **Resolution.** Based on our careful consideration of the record, we will reallocate the H channels to MDS.[9] There appears to be minimal usage of these channels other than for the provision of MDS-type video entertainment programming, and the commenters overwhelmingly support reallocation.[10] Accordingly, pursuant to the rule changes adopted today, current licensees will retain their licenses but will henceforth operate as MDS licensees under the Commission's Part 21 rules. We believe that reallocation of the H channels to MDS will increase H-channel utilization by easing the administrative and operational burdens associated with80use of those channels for MDS operations, both for operators and the Commission. It will also reduce the administrative costs of use of the H channels for operators and the Commission. At the same time, we recognize that a few existing H-channel licensees engage in OFS-type operations, and we will allow them to continue to provide service. We will not automatically grandfather these H-channel OFS operations, however, because we believe there are very few such users, and because we wish to facilitate the conversion to MDS service by willing H-channel operators. Therefore, if a current H-channel licensee wishes to continue to provide service or transmit signals incompatible with Sections 21.903 through 21.908 of the Commission's Rules, that licensee must file, on or before January 2, 1992, a written request to the Private Radio Bureau that operation of its H-channel station be regulated under Part 94. If the Commission permits an H-channel station to remain subject to Part 94 and that station is later assigned, it will be converted to regulation under the Part 21 rules unless (1) regulation under Part 94 is requested in the assignment application, (2) the applicant shows good cause why the H-channel station should not be converted to Part 21 regulation, and (3) the Commission determines that the public interest will be served by regulation of the station under Part 94.[11]

B. Reallocation of Response Channels

10. **Background/Proposal.** Each of the channels in the 2.5 GHz band has an associated 125 kHz response channel, a narrow-band audio channel generally used with the primary channel for two-way communication. We noted in the *Further Notice* that current use of the response channels appears very limited. We suggested that there is little likelihood that the response channels would be widely used for ITFS in the near future and that it is doubtful that a single operator of a multichannel wireless cable system would require all of the response channels associated with the primary channels in its system. Because the response channels can be useful for private radio communications, the *Further Notice* proposed that all of the response channels associated with the H channels remain allocated to OFS, and that 50 percent of the MDS response channels and 25 percent of the ITFS response channels be reallocated to OFS, for a total of 12 response channels. The *Further Notice* also asked whether existing response channel operations should be grandfathered. *Further Notice* at 6473.

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[8] Association of American Railroads Comments at 2.

[9] In order to implement this decision in an expeditious fashion, we will not accept new OFS applications for the H channels after September 26, 1991. We will accept minor amendments, as defined in 47 C.F.R. Section 1.962 of the Commission's Rules, to OFS applications already on file. Parties interested in filing MDS applications for the H channels can again submit applications on January 2, 1992, or thereafter. This action will allow the Private Radio Bureau time to complete its processing of applications already received in an orderly manner. Also, this action will not be overly burdensome to potential applicants of the H channels as they will soon become available under Part 21. We note that our decision not to accept OFS applications for the H channels is procedural in nature and is therefore not subject to the notice and comment provisions of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 355(d); *Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). Further, as a procedural action, it is not subject to the 30 day effective date provisions of the APA. In any event, good cause exists to make the freeze on the acceptance of applications for the OFS H channels effective immediately because advance notification could prompt the filing of additional applications under the OFS rules, thus undermining our reallocation and defeating the purpose of the freeze.

[10] Appendix D lists procedures and standards for the transition of the H channels to MDS.

[11] We will not permit ITFS entities to apply for new H-channel MDS licenses, as some commenters request, because such use would be inconsistent with the purposes of the reallocation. Current ITFS users of H channels, however, may apply to be reclassified as ITFS licensees on those channels, to avoid loss of existing ITFS service. In order to update the Commission's records, ITFS users of the H channels are directed to notify the Mass Media Bureau of their election of ITFS status on or before January 30, 1992. If H channels licensed to an ITFS entity are later assigned or transfered, the channels will be converted automatically to regulation under the Part 21 Rules as of the date that consent to assignment or transfer is granted.

11. In addition, the *Further Notice* proposed that unused response channels associated with in-use primary channels be available for OFS use on a co-primary basis with OFS licensees, subject to the same interservice coordination procedures developed for the shared spectrum in the 18 GHz band. It also asked whether the response channels should be made available for multipoint OFS operations or would be better suited to point-to-point operations. Finally, the *Further Notice* proposed that all applications for OFS use of the response channels (whether by OFS, MDS or ITFS entities) be subject to the general frequency coordination requirements for Domestic Public Fixed Radio Services, 47 C.F.R. § 21.100(d), and sought comment on additional measures to eliminate adjacent-channel interference.

12. **Comments.** Minimal comment was received regarding MDS and OFS response channels, although Phase One contends that reallocation of MDS response channels would be detrimental to wireless cable service, and asserts that MDS operators have not yet had an opportunity to expand their networks into the areas that typically use response channels. With respect to reallocation of the ITFS response channels, only two commenters, both OFS users, support such reallocation, arguing that the channels have been underutilized. Other commenters oppose reallocation of the ITFS response channels, arguing that the channels are needed for interactive uses such as a homework facsimile system and interactive work stations. Opponents also assert that video compression technology is being developed to enable ITFS response channels, currently limited to audio talk-back operations, to transmit video talkback, which will significantly increase their utilization. The Ana G. Mendez Educational Foundation notes that the Commission proposes to leave only two response channels per group on the grandfathered E and F ITFS channels, and questions how the Commission would deal with ITFS systems that operate on fewer than four channels in a group or channel groups that are shared among licensees. In addition, most commenters contend that existing uses of the response channels should be grandfathered, although they are generally referring to the ITFS response channels.

13. Regarding other aspects of the allocation proposal, commenters agree that the prior coordination procedures proposed in the *Further Notice* should be adopted, although some parties argue that OFS use of currently unused response channels must be on a secondary rather than a co-primary basis. Commenters also argue that any reallocated response channels should be dedicated for point-to-multipoint rather than point-to-point uses, since response channels are not sufficiently separated to permit pairing for transmit and receive communications in a conventional point-to-point mode. The Association of American Railroads, however, contends that most of the response channels should be made available for point-to-point operations only.

14. **Resolution.** Based on our review of the record, we have decided that all of the response channels associated with the H channels will remain for OFS use, and 50 percent of the MDS response channels will be reallocated to OFS.[12] The demand for point-to-point and point-to-multipoint OFS services, such as radio local area networks, wireless PBX's, remote meter reading and load management, and control of private carrier paging transmitter, continues to grow, stretching the capacity of the current allocated spectrum. MDS systems can effectively utilize some two-way capability, but the commenters have not advanced a compelling reason why MDS entities should retain all of the E and F response channels. A wireless cable system, composed of several MDS channels, should need only a few response channels for anticipated feedback services, such as pay-per-view ordering, service/product ordering, utilization monitoring, home banking, home shopping, and other similar services. Because we are not aware of which specific MMDS response channels are currently in use, we will not automatically grandfather all existing MDS response channel licenses. Instead, we will permit licensees to seek grandfathered status based on their current operations. On or before January 30, 1992, MMDS licensees must request of the Common Carrier Bureau grandfathered status based on current use. If any grandfathered response channels are subsequently assigned, they will automatically be converted to OFS unless (1) grandfathered status is requested on the assignment application, including a showing of good cause why the channels should be grandfathered, and (2) the Commission grants such status in connection with action on the application.[13]

15. We will not reallocate any of the ITFS response channels, including response channels associated with ITFS systems operating on the E and F channels. As commenters argue, student-teacher dialogue is a critical aspect of any educational endeavor, and distance learning thus benefits greatly from two-way communication. These considerations persuade us of the need to maintain the response channel capacity of each primary channel. Accordingly, all ITFS response channels will be preserved for interactive uses.

C. Involuntary Station Modifications

16. **Background/Proposal.** MDS and ITFS applicants for new or modified facilities must generally provide a desired-to-undesired signal ratio of 0 dB or better to previously existing or proposed adjacent-channel receive facilities, except that pre-May 26, 1983 ITFS facilities

[12] As proposed in the *Further Notice*, the response channels associated with channels E3, E4, F3 and F4 (2688.5625 MHz, 2689.5625 MHz, 2688.6875 MHz and 2689.6875 MHz, respectively) will be reallocated to OFS. The response channels associated with ITFS systems operating on the E and F channels will not be reallocated. The grandfathered use of these reallocated response channels by an MDS or ITFS licensee in an individual case will not warrant allocation of other response channels in their place.

[13] At this time, we are unable to determine the appropriate assignment and operational criteria for this new OFS spectrum. Very few commenters addressed these matters so we will defer any such decisions until we complete a new rulemaking proceeding that addresses the appropriate technical standards for these channels. OFS applications for these response channels will not be entertained until after we adopt technical standards. We will soon initiate a rule making addressing issues such as channelization, co-channel and adjacent channel interference protection, and permissible system configurations for these channels. The American Petroleum Institute has submitted comments on technical rules to govern this spectrum, which will be considered in any rule making undertaken on this issue.

must be protected to 10 dB.[14] The *Report and Order* concluded that an applicant, permittee, conditional licensee or licensee that is prevented from invoking the 0 dB interference protection standard for projecting its impact on an existing ITFS licensee because of that licensee's pre-May 26, 1983, ITFS facilities, may modify the facilities of the pre-existing ITFS station. Specifically, the initiating party may invoke the 0 dB protection &standard with regard to these older facilities where it will modify the ITFS facilities with equipment adequate to perform at that level of interference. *Report and Order* at 6414. Stations with older equipment, incapable of adjusting their aural power levels to meet the new aural power standard adopted in the *Report and Order,* may continue to use such equipment. If use of that equipment becomes a source of adjacent-channel interference, however, the licensee must accept equipment capable of signal power adjustments offered by another party seeking to reduce adjacent-channel interference. *Id.* at 6421.

17. The *Further Notice* sought comment on the procedures to be followed in implementing these involuntary modifications. In addition, the *Further Notice* proposed to permit involuntary modification where a station, because of interference concerns, is prevented from operating at 100 watts or installing a signal booster, or where another station cannot meet the revised transmitter tolerance standard or the revised out-of-band emissions standard,[15] and the first station wishes to upgrade the other station's facilities in order to reduce interference. *Further Notice* at 6474. In all cases, the modifying party must show that the harmful interference can be prevented by modifying the initial licensee's facility. The *Further Notice* additionally stated that "[c]olocation of facilities is essential if wireless cable is to become a viable multichannel service provider," and proposed that an existing licensee may be involuntarily colocated with another licensee if such colocation will not negatively affect provision of service and if the initiating operator is willing to bear all costs. *Id.*

18. The *Further Notice* also proposed to condition Commission approval of the initiating party's application on completion of the modification. It also provided that the initiating party will be responsible for all modifications necessitated by its proposal, *i.e.,* the modifying party must also offer to modify other stations suffering harmful interference as a result of the initial involuntary modification. The *Further Notice* further proposed that the affected licensee must accept the modification unless it can show that the change would be impracticable, and sought comment regarding the definition of impracticability. We also asked what the initiating party's role should be in the upgrade, and what residual or continuing expenses, if any, should fall upon the upgraded operator. *Id.*

19. **Comments.** Some ITFS commenters contend that the Commission's proposal is unworkable and that the Commission should require the initiating party to attempt to enter a voluntary agreement with the interfered-with licensee.

ITFS commenters especially oppose involuntary colocation. They argue that colocation would be technically complicated because ITFS facilities are designed to serve specific receive sites, whereas MDS facilities are designed to serve the largest possible number of subscribers. They also submit that a price cannot be placed on many aspects of site location such as ease of accessibility, cooperative owners, the degree of radio frequency interference, and the integrity of a studio-to-transmitter link (STL) path. Commenters additionally note that the colocated ITFS operator might not be able to return to the old site if the MDS operator goes bankrupt, and that other suitable sites may not be available. On the other hand, a few commenters support involuntary colocation if it will not negatively affect existing service and if another operator is willing to bear all expenses.

20. In the event involuntary modifications are permitted, commenters argue that the initiating party should bear all initial and residual expenses, including: purchasing, testing and installing a new transmitter; reconfiguration of existing equipment; labor costs; long-term maintenance; engineering and legal fees; administrative costs; increased electric bills; travel expenses; phone bills; reimbursement for service interruptions caused by the modification; increased rent due to installation of a larger antenna; and the cost of changes to the supporting structure necessitated by the larger antenna. Commenters also suggest that the initiating party make its reimbursement by prepayment bond or escrow account. In opposition, some wireless cable entities contend that the non-initiating party should make some contribution, as it is enjoying a benefit. ITFS commenters respond that the benefit will often be theoretical only, as power increases or other improvements may be superfluous to their current and anticipated operations.

21. Some commenters also submit that the initiating party's authorization to operate its modified facility should be conditioned upon satisfactory completion of the modification. ITFS commenters contend that the modified party should be entitled to control the timing of the modification to avoid a disruption in service. Finally, the commenters suggest various tests to determine impracticability. Some argue that the modification is impracticable if service will not be similar to or better than it was prior to the modification. Commenters also submit that some modifications may be impracticable because the modification would cause interference to another facility that cannot be upgraded, or would require a larger receive site antenna or a replacement tower offensive to aesthetic considerations or in violation of zoning laws. Some ITFS commenters also contend that the burden should be on the modifying party to prove practicability.

22. **Resolution.** The Commission has encouraged and will continue to encourage parties to enter into voluntary agreements regarding station modifications, and we expect that most modification arrangements will be voluntary in light of the obvious advantages of cooperation for all involved. Parties are sometimes unable to agree, however,

[14] Harmful adjacent-channel interference is defined as a desired to undesired signal ratio of less than 0 dB, unless the protected ITFS station was constructed before May 26, 1983, in which case a ratio of less than 10 dB constitutes harmful interference. 47 C.F.R. §§ 21.902(f)(2), 74.903(a)(2); *Second Report and Order* in MM Docket No. 83-523, 101 FCC 2d 50, 98 (1985).

[15] The revised equipment standards adopted in the *Report and Order* do not apply to previously installed equipment. *Report and Order* at 6418.

rendering potentially beneficial modifications impossible. We will therefore authorize involuntary modifications in the situations mentioned in the *Report and Order* and the *Further Notice*,[16] with appropriate safeguards. As colocation of MDS and/or ITFS facilities can be essential to resolving adjacent-channel interference problems, affecting the grantability of up to half of the channels in an area, it is critical to the successful establishment of wireless cable in many areas. We therefore include involuntary colocation as an acceptable involuntary modification. An MDS or ITFS licensee, conditional licensee or applicant in the area may seek involuntary colocation of another facility with its own facility. An MDS or ITFS licensee may not, however, force another operator to grant access to that operator's existing site, although it can offer that option as an alternative. In addition to licensees, applicants may seek involuntary colocation; to minimize any unnecessary impact on ITFS entities, only those applicants with unopposed[17] applications may do so.

23. The application for involuntary modification may be prepared, signed and filed by the party initiating the change, and must be served on the affected ITFS party on the day of filing.[18] The modified operator will have 60 days to oppose any involuntary modification. The petitioner should state its reasons for opposing the modification with specificity, including engineering challenges and practical problems such as limitations of the proposed antenna support structure. We will not adopt a specific "impracticability" standard as proposed in the *Further Notice*, as we cannot predict at this time the full range of practical considerations that may be interposed. Instead, the Commission will resolve these matters on a case-by-case basis. An issue that will receive particular attention in cases proposing involuntary colocation will be the desirability of the affected party's present site compared to the proposed new site. This issue contemplates both serviceability for existing receive sites and nontechnical issues such as accessibility of location, rent or other lease terms compared to the new site, and any prejudicial consequences of a site move that cannot be adequately protected against or compensated for.

24. The initiating party will be responsible for all costs necessary to the modification, including purchasing, testing and installing new equipment (including labor costs), reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the modification application (but not for the modified party's adversarial efforts[19]), and other reasonable documented costs. The initiating party must also secure a bond or establish an escrow account to cover reasonable ongoing expenses that may fall upon the remaining licensee such as incremental increase in power, maintenance and site rental rates, if applicable. The bond or escrow account should also account for the possibility that the modifying operator subsequently becomes bankrupt. This is particularly important in the colocation situation, as the ITFS licensee's prior site may be unavailable and the licensee may not be able to locate a suitable new site. If it becomes necessary for the Commission to assess the sufficiency of a bond or escrow amount, it will take into account such factors as projected electricity or maintenance expenses, or relocation expenses, as relevant in each case.

25. The involuntarily modified facilities must be operational before the initiating party will be permitted to begin its new or modified operations.[20] Further, the modification must not disrupt the ITFS licensee's provision of service, and the licensee whose facilities are being modified must have the right to inspect the work and make reasonable demands for changes. We reiterate that we strongly encourage and expect the cooperation of all parties so that the majority of modifications will be voluntary.

D. Modifications Not Requiring Prior Authorization

26. **Background/Proposal.** Section 21.42 of the Commission's Rules lists a number of modifications which can be made without prior Commission authorization. In the *Further Notice*, we sought comment on Mitchell's suggestion that the list be augmented to facilitate colocation. Specifically, we sought comment on the types of changes

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[16] WCA argues that our list of permissible situations does not cover power increases up to less than 100 watts. In the *Further Notice*, we proposed that "a station prevented from operating at 100 watts" may modify the interfered-with station to eliminate interference. *Further Notice* at 6474. We did not intend that involuntary transmitter modifications be restricted solely to stations increasing their output power to the full 100 watts (roughly equivalent to 33 dBW EIRP); involuntary modifications can be acceptable with respect to any permissible output power increase that would otherwise cause harmful interference to another station.

WCA also argues that any modification (in addition to those listed) should be involuntarily imposed whenever the modification will reduce interference to either the facility being proposed or the station which is existing or was previously proposed. We decline to adopt WCA's proposal. The purpose of the involuntary modification proposal in the *Further Notice* was to make it easier for wireless cable operators to implement the specific equipment changes adopted in the *Report and Order*. We believe that the Commission's rules already provide sufficient protection against harmful interference and that WCA's proposal is therefore not necessary.

In addition, the Association for Higher Education of North Texas contends that because signal boosters can only be licensed on a secondary basis, parties seeking to use a booster should not be allowed to modify another station. The Association is incorrect; signal boosters may be licensed on a primary basis. *See* 47 C.F.R. § 21.913; *Report and Order* at 6422-23.

[17] An unopposed application is one that faces no competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for competing applications and petitions to deny has passed. If an application is opposed, the companion ITFS involuntary modification application will be returned. It may be refiled when the initial application is again unopposed, *e.g.*, after lottery selection or denial/dismissal of the petition to deny.

[18] The applicant should submit FCC Form 330 but need not fill out Section II (Legal Qualifications); a cover letter must clearly indicate that the modification is involuntary, as well as the parties involved.

[19] These costs can be included in any voluntary settlement prior to Commission disposition.

[20] The involuntarily modified entity cannot unreasonably delay implementation of the involuntary modification, *e.g.*, by refusing access to facilities.

that should be considered *de minimis*, and on any additional steps that could be taken to streamline the colocation process. *Further Notice* at 6474.

27. **Comments.** Mitchell contends that the following changes, when sought in conjunction with a colocation of facilities, should be permissible without prior authorization pursuant to § 21.42: (1) up to a 50 percent increase in radiation center above ground; (2) relocation of a transmitter site within the original 15mile service area; (3) relocation of the transmitter site outside the service area if there is at least a 50 percent overlap of the previous and new service contours; and (4) a power increase of 3 dB or less. The few other parties addressing this issue oppose modification of Section 21.42, arguing that increases in height, relocations and power increases have the potential for creating new interference and must be coordinated with other parties and the FCC.

28. **Resolution.** Mitchell has not shown that § 21.42 can be modified without the potential for increasing harmful interference to other parties. Because such potential exists, we believe it is reasonable for parties proposing the modifications enumerated by Mitchell to seek prior Commission authorization. We believe that prior Commission review of these modifications is necessary to sufficiently protect other operators, both MDS and ITFS, from harmful interference.

E. Involuntary Migration of Point-to-Point Facilities

29. **Background/Proposal.** In the *Report and Order*, we modified our rules to permit MDS operations to displace ITFS point-to-point operations on the E and F channels, provided that suitable alternative spectrum exists and that the MDS station pays for the migration, with suitability of spectrum determined on a case-by-case basis. *Report and Order* at 6414-15. In the *Further Notice*, we requested comment on the factors we should use to evaluate suitability of spectrum to determine whether displacement should be permitted. *Further Notice* at 6474.

30. **Comments.** Some commenters argue that the path reliability of the new spectrum must meet particular standards, such as the EIA RS-250-C standard, which requires video signal availability 99.99 percent of the annual operating time. They assert that this standard accounts for frequency, path length, Fresnel zone clearance, terrain, climate and rain attenuation. Others suggest the NTC-7 standard, which requires that the spectrum be able to support full-motion video. Phase One submits that availability should be based on a successful interference analysis showing that the new ITFS receive sites maintain a 45 dB C/I ratio for co-channel stations and 10 dB C/I for adjacent-channel stations. Mitchell similarly points out that for non-ITFS channel groups, the Commission uses a 45 dB D/U ratio to determine co-channel protection, and asserts that substantially similar spectrum using equipment configurations that achieve the same signal-to-noise ratio at the receiver output site should be considered acceptable.

31. WCA submits that the ITFS licensee should be left with a link that delivers a signal as good as its prior link, considering climate, path lengths, equipment factors, spectrum attenuation and other variables. It argues that replacement links will generally use FM technology that is inherently superior to the AM vestigial sideband technology employed when ITFS spectrum is used for point-to-point applications. It submits that commenters who argue that the new links should provide 99.99 percent path reliability provide no indication that any ITFS point-to-point link currently in operation on the E or F channels offers 99.99 percent reliability. Because so many factors come into play in determining suitability of spectrum, WCA suggests that the Commission consider suitability on a case-by-case basis, at least until it has garnered further experience in addressing migration proposals. Other commenters assert that multi-hop systems will be untenable due to the increased leasing and maintenance costs associated with multiple relay sites. Commenters additionally argue that the migration should not interrupt service, and that the migrated facility should be placed into operation prior to authorization of MDS facilities on the abandoned frequencies. A few parties also reiterate their opposition to point-to-point migration generally.

32. **Resolution.** Involuntary migration of point-to-point facilities will only be permitted if the substitute spectrum is, at a minimum, licensable by ITFS operators on a primary basis and provides a signal that is equivalent to the prior signal in picture quality and reliability. The alternative spectrum need not be specifically allocated to the ITFS service.[21] Based on the comments of the parties as well as our own analysis, we do not believe that a uniform standard can be established to determine suitability in all cases, due to widely differing conditions. For example, while the 2, 7 and 13 GHz bands might not be suitable in some areas due to congestion, they may be acceptable in other areas. Similarly, while the 18 and 23 GHz bands may not be usable in some locations due to poor propagation and expensive equipment, they may be adequate in other areas. Moreover, signal quality of individual ITFS stations varies widely from system to system; it would be inappropriate to require, for example, that the initiating party provide a TASO 2 signal when the ITFS system was previously operating at a lower standard.[22] Because of the limited number of ITFS point-to-point operations on the E and F channels, we can resolve these situations on a case-by-case basis.[23]

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[21] Some commenters argue that the alternative spectrum must be available for excess capacity leasing. While point-to-point spectrum is not generally suitable for excess capacity leasing, we will take leasing into consideration if the operator being moved currently leases excess capacity or can show that it reasonably expects to do so in the near future.

[22] We note, however, that if the initiating party is able to provide the ITFS licensee with a TASO 2 signal, its migration proposal will be presumed grantable unless the ITFS operator provides evidence to the contrary.

[23] We note that with respect to displacement of primary point-to-point ITFS operations on the E and F channels, we concluded in the *Report and Order* that potential expansion may be a consideration in determining whether alternative available spectrum is suitable. Some commenters contend that migration should extend to all ITFS licensees on the E and F channels, not just point-to-point operations, while others contend that the rule adopted in the *Report and Order* already covers all E and F-channel ITFS operations. The rule adopted in the *Report and Order* applies only to E and F-channel point-to-point operations.

33. If the initiating party locates what it believes to be suitable alternative spectrum, it must submit data with the modification application for the facility to be modified regarding the strength, reliability and interference level of the prior signal and the projected strength, reliability and interference level of the new signal. On the same day it files the modification application, the initiating party must serve a copy of the application on the party to be moved. The operator being moved will have a 60-day period in which to oppose the initiating party's application. The petitioner should offer evidence, including engineering data, that it cannot be moved without detriment to its provision of service. If the migration is permitted, the initiating party will be responsible for all costs. Like the involuntary modification situation, this includes construction and equipment expenses, legal and engineering costs, and other appropriate documented expenses (*see* Section II-C, *supra).* Parties must secure a prepayment bond or establish an escrow account to protect the migrated party in the event that the initiating party ceases operation. The bond or escrow arrangement must account for any incremental increase in the cost of continuing operation on the new system or returning to the former frequencies abandoned by a bankrupt wireless cable operator. Moreover, if the new facilities prove to be unsatisfactory in practice, the party whose facilities were modified will be entitled to revert to its former facilities at the expense of the modifying party. (We reiterate that we strongly encourage the cooperation of all parties to reach a voluntary agreement.

F. Cable Cross-Ownership

34. **Background/Proposal.** In the *Report and Order,* we prohibited cable systems that are sole providers in their franchise areas from holding MDS licenses and from leasing time on MDS or ITFS stations within their franchise areas. We solicited comment on three issues: (1) how to define the rural exception adopted in the *Report and Order;* (2) whether cable operators should be required to divest existing wireless cable interests; and (3) whether and how to define a local programming exception.

35. **Rural Exception -- Comments.** Most cable commenters support a rural exception. Some commenters agree with our proposal that the definition of a rural area should be based on § 63.58 of the Commission's rules, which permits telephone companies to provide cable service in an "incorporated place" or an "unincorporated place" (as defined by the Census Bureau) with a population below 2,500. Others argue that the population limit should be less restrictive. Cable Operators and Associations suggests that the Commission create a priority period, for example one year, during which all non-cable parties may apply for vacant MDS frequencies. At the expiration of that period, frequencies that remain available would be considered rural and would therefore be available for use by cable systems. Some commenters also suggest that the Commission establish an exception for non-rural areas that would otherwise remain unserved.

36. On the other hand, WCA and HITN vehemently oppose any rural exception. WCA submits that while the cable industry has historically refused to serve rural areas due to higher-than-normal construction costs per subscriber, the wireless cable industry has been able to take advantage of its inherent cost efficiencies to bring service to rural communities. In addition, Mitchell opposes the grant of any exemption in those areas where there is a wireless cable operator who already controls a minimum of four wireless cable channels.

37. **Resolution.** Consistent with our use of the cable/telco cross-ownership prohibition (47 C.F.R. § 63.54) as a general model for the cable/MDS cross-ownership prohibition, we will adopt a rural exception similar to the cable/telco rural exception in Section 63.58 of the Commission's Rules. We conclude that cable operators may apply within their franchise areas for MDS channels or lease MDS or ITFS channels in rural areas, which are defined by the Census Bureau as "incorporated areas" or "unincorporated areas" with a population of less than 2,500.[24] We expect that this rural exception will speed the introduction of multichannel service to customers in sparsely populated areas without appreciably reducing realistic and desired opportunities for wireless cable operators to introduce service competitive with existing cable service. Cable operators may not, however, apply for MDS channels in rural areas if an MDS entity is already operating on at least four MDS channels in the area. We have developed this exception to extend service to areas not currently served; if a rural area is already served by an MDS entity on at least four channels, the justification for the exception to the general cross-ownership prohibition has been eliminated or reduced to the point where it does not outweigh the considerations underlying the general prohibition. An exception for other, non-rural, areas is not warranted in light of the record before us. We do not expect non-rural areas generally to have the same difficulty attracting wireless cable service as rural areas, and thus, again, the considerations underlying the general prohibition are not outweighed.

38. **Divestiture -- Comments.** The commenters, mostly cable entities, overwhelmingly oppose forced divestiture of existing MDS/cable and ITFS/cable operations, contending that divestiture would be unduly disruptive and would deprive customers of service. They note that in many markets, cable operators have invested substantial funds, effort and time in applying for, constructing and operating wireless systems. They also point out that the Commission's rules already prevent warehousing because MDS operators are required to build and deliver service within 12 months, and they argue that there is no evidence of cable companies that operate MDS facilities engaging in

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[24] The first publication in which the population of places having 2500 inhabitants or more was officially designated as urban was the Supplementary Analysis of the Twelfth Census (1900), published in 1906. U.S. Department of Commerce, Bureau of the Census, Series P-23, No. 1, The Development of the UrbanRural Classification in the United States: 1874-1949, August 5, 1949. Since that time, the Census Bureau has used this definition with minor modifications. *See* U.S. Department of Commerce, Bureau of the Census, Number of Inhabitants, 1970, Series PC(1)-A.

In order to qualify for the exception, the cable television company's entire cable television service area must be rural. The rural exception will be inapplicable if the protected service area of the MDS station includes even a portion of a place which is non-rural, or if any of the receive sites of the ITFS lessor is in a place which is non-rural. *See* 47 C.F.R. §§ 63.58(a)(1), (2) and (3); *see also* Elimination of the Telephone Company/Cable Television Cross-Ownership Rules, Sections 63.54-63.56, for Rural Areas, 88 FCC 2d 564,575 (1981).

anticompetitive activities. Moreover, they submit, the Commission has generally grandfathered existing interests in the past when it has made structural industry changes. In addition, most contend that grandfathering should extend to applicants and permittees as well as licensees. On the other hand, commenters that support divestiture argue that the cable industry has a strong incentive to frustrate the introduction of wireless cable by warehousing MDS channels, particularly where its systems are franchised and operational.

39. **Resolution.** Existing cable/wireless cable operations and contracts will be grandfathered. Divestiture not only would be a hardship to both the cable operator and its customers, whose service would be disrupted or eliminated, but appears unnecessary given the apparently limited number of systems operated by cable companies. We will also grandfather cable applications for MDS channels filed before February 8, 1990, the date the initial *Notice of Proposed Rule Making and Notice of Inquiry* in this proceeding was adopted.[25] We will also grandfather lease arrangements between cable and MDS or ITFS entities for which a lease or a firm and enforceable agreement was signed prior to February 8, 1990. After that date, the parties had notice that a cross-ownership restriction could be adopted and that divestiture could be required, so the same equitable arguments are not applicable.[26] If MDS channels currently licensed to a cable company or affiliate are subsequently assigned, or a lease agreement for ITFS or MDS channels is subsequently assigned, the cable/MDS cross-ownership prohibition will apply.

40. **Local Programming Exception -- Comments.** Cable operators contend that permitting a cable operator to use MDS frequencies for local distribution of locally produced programming to cable headends will have little effect on the development potential of wireless cable systems, and will provide significant public benefit. They argue that other methods of distribution, such as CARS, LPTV, satellite and fiber optics are too expensive and/or technically inadequate. Commenters opposed to a local programming exception submit that the cable industry has managed in the past to distribute local programming via CARS, landline and satellite transmission facilities, and that the cable commenters have given no reason why they cannot continue to do so. WCA asserts that because wireless systems generally serve areas larger than most cable franchise areas, several cable operators could secure scarce spectrum within a given wireless cable service area pursuant to a local programming exception.

41. **Resolution.** In recognition of the public interest benefit which can derive from local programming ventures, we will create a local programming exception to the licensing and leasing prohibitions of Sections 21.912 and 74.931(e). There will be a limited exception to those prohibitions for MDS or ITFS channels used in the delivery to multiple cable headends of locally produced programming, that is, programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area.[27] Such an exception will permit and promote an additional outlet40for locally originated programming. Under this exception, a cable operator[28] will be permitted one MDS channel, or its equivalent in ITFS excess capacity,[29] in an MMDS protected service area for this purpose. No more than one MDS channel, or its equivalent in ITFS excess capacity, in an MMDS protected service area can be used under this exception. The licensee of facilities used by a cable operator to provide local programming, by lease or otherwise, must include in the notification it files with the Commission a cover letter explicitly identifying itself or its lessee as a local cable operator or affiliate and stating that any relevant lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one MDS channel or its ITFS equivalent per party and per area include any grandfathered cable/MDS or cable/ITFS operations.[30] In applying for an MDS channel, the cable operator must show that it will use the channel to provide the proposed local programming within one year. Similarly, local programming service pursu-

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[25] *Notice of Proposed Rule Making and Notice of Inquiry* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 971 (1990).

[26] Each applicant for MDS stations who filed on February 8, 1990, or thereafter an application which is now inconsistent with Section 21.912 of the Commission's Rules must notify the Commission of such inconsistency on or before January 30, 1992, and must amend its application on or before March 2, 1992 to bring it into compliance with current rule requirements. Absent such amendment, inconsistent applications will be dismissed. If a cable television company lease agreement for MDS or ITFS station time or capacity has been executed on February 8, 1990, or thereafter, a copy of the lease must be filed on or before March 2, 1992, together with a description of divestment procedures. Assignment or transfer of control applications for MDS stations filed after the effective date of this *Second Report and Order* must include a description of any cable television company interest in the assignor, assignee, transferor or transferee.

[27] By "locally produced," we refer to programming that is entirely or almost entirely produced in or near the cable operator's franchise area. We do not intend by this requirement, however, to prohibit the inclusion in locally produced programs of some relevant material or segments produced elsewhere but incorporated in a larger, local program. Nor do we intend to preclude the use of any programming which has aired on local television stations. Such material could be included in a locally produced program provided it constituted only a small or minor part of the overall program. For example, an all-day news channel could include some segments also aired on local broadcast news programs.

[28] For purposes of this exception," cable operator" includes any entity which, under the attribution rules applicable to the underlying cable/MDS prohibition, would be precluded from obtaining an MDS authorization.

[29] Two or three ITFS channels may be necessary to provide an equivalent level of service as one MDS channel. In such a circumstance, the effect on future wireless cable capacity and/or on ITFS capacity would be equivalent to the effect on the provision of local programming by a cable television operator.

[30] In these grandfathered situations, we will consider granting waivers to permit the use of a second MDS channel for the delivery of locally produced programming. Because allocating a second channel to this use would further reduce the channel capacity available for wireless cable service, we will require an applicant for the second channel to demonstrate, at a minimum, that it is ready and able to provide additional locally produced programming to area cable systems, and that no other practical means of delivering the programming are available to it. In considering requests for waiver, we will also take into account the competitive environment for the production and delivery of locally produced programming in the relevant markets.

ant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channels, whichever comes later. If an MDS license for these purposes is granted and the programming is subsequently terminated, the channel will be automatically forfeited on the day after the local programming is discontinued.

G. Use of Available ITFS Facilities by Wireless Cable Entities

42. **Background/Proposal.** In the *Further Notice*, we proposed to permit wireless cable operators to apply for available ITFS channels, subject to restrictions and conditions to preserve adequate opportunity for the development of future ITFS service. We noted that a number of ITFS channels remain unused in many television markets, particularly smaller markets. These unused frequencies currently benefit neither the educational community nor the public at large. To make more efficient use of the spectrum and at the same time foster future ITFS development in these areas, we sought comment on the following proposals:

> Unconditionally reserve eight of the 20 ITFS channels available in a community for future ITFS use;
>
> Limit non-ITFS use to a maximum of eight channels, following ITFS application procedures;
>
> Require mutually-exclusive non-ITFS applications to be filed on the same day as the initial application (per MDS filing procedures, 47 C.F.R. § 21.914);
>
> Permit ITFS entities the normal ITFS 60-day cutoff period for the filing of ITFS applications mutually exclusive with non-ITFS applications;
>
> Specify the MDS protected service area for non-ITFS licensees of ITFS facilities;
>
> Limit eligibility to those entities that already hold licenses or leases for a minimum number of MDS/MMDS channels in the area;
>
> Prohibit ITFS applicants from filing applications mutually exclusive with non-ITFS applications, unless no other suitable available channels exist;
>
> Provide ITFS entities with access to channels licensed to non-ITFS entities, permitting the ITFS entities to use such systems without limitation from 8:00 AM to 4:00 PM Monday through Friday; the parties may negotiate for a different distribution of hours between 8:00 AM and 10:00 PM Monday through Saturday;
>
> Require that an ITFS operator must use 40 hours per week on each channel before requesting access to additional channels, and that it may use more than 40 hours if agreed to by the MDS licensee;
>
> Provide that ITFS applicants will be permitted to seek only as many channels as they can fully utilize for at least 30 hours per week (so as to permit the largest possible number of institutions to avail themselves of the facilities); and
>
> Require that non-ITFS licensees provide and install up to four receive sites for each channel used by an ITFS entity.

43. **Comments.** ITFS entities overwhelmingly oppose the Commission's proposal, arguing that it effectively constitutes a reallocation of ITFS channels to MDS. They assert that the level of present use should not be equated with lack of interest by educational institutions, and cite the difficulties involved in establishing an ITFS system. They also question whether the additional frequencies are necessary to the development of wireless cable, and they contend that the proposal will cause MDS operators to avoid leasing ITFS excess capacity, thereby depriving ITFS operators of revenue and even, in some cases, the very opportunity to build a system. In addition, they note that while ITFS systems are designed to reach specific locations such as schools, community centers, fire stations and libraries, wireless cable operators locate where the maximum population can be reached. They therefore submit that the non-ITFS party will build a system that will not be readily adaptable to provision of ITFS programming. Some ITFS parties also argue that this proposal will interfere with state ITFS systems currently being planned and assert that each state should have the right to bar wireless cable operations on ITFS channels within its borders.

44. WCA notes that much of the ITFS spectrum has gone unused for 30 years, and that the Commission's proposal to permit MDS entities to be licensed on some of that spectrum may in fact help the ITFS industry. WCA submits that permitting wireless cable direct access to available ITFS channels, subject to the condition that airtime be made available to qualified local educators, will provide an educator that cannot afford or does not have the staff and programming resources to operate its own station a means of transmitting educational programming at no cost. WCA further asserts that there is no evidence that the proposal will disrupt the development of state and regional networks.

45. Some ITFS commenters suggest that in the event the Commission's proposal is adopted, wireless cable applicants should be required to demonstrate that the spectrum allocated to MDS has been exhausted (including demonstration of attempts to lease) in a community before it is permitted to apply for ITFS channels. WCA opposes this requirement, arguing that it may be difficult to secure all eight MMDS channels in a community for various reasons. ITFS parties also assert that the wireless cable applicant should be required to notify ITFS parties in the area where the wireless cable facility is to be located. WCA argues that it would be impossible to identify all of the eligible entities in an area given the broad scope of ITFS eligibility. It instead suggests that any local notification requirement be modeled after § 73.3580(c)(1) of the Commission's Rules, which requires an applicant for new broadcast facilities to publish a series of notices in local newspapers once its application has been filed. In addition, some ITFS parties suggest that the wireless cable operator's use of the ITFS spectrum should be secondary, while WCA argues that no wireless cable operator will construct costly facilities and build a business around channels that can be precluded at the behest of a local educator. ITFS commenters also oppose the proposal that they be prevented from applying for access to channels controlled by a wireless cable licensee when other available ITFS channels exist.

46. Commenters generally support the Commission's proposal to reserve at least eight channels for future ITFS use. While WCA does not oppose this eight-channel reservation, it disagrees with our proposal to permit wireless

cable entities to apply for no more than eight of the remaining 12 channels. It argues that in order to effectively compete against cable, a wireless cable entity must have as many channels as possible, and there is no reason why it should be limited to eight channels in those instances where more than eight channels would then remain for future ITFS use. In addition, parties supporting the proposal agree that eligibility for the available channels should be limited to those wireless cable entities who already control wireless cable channels in the area in question. They submit that this will prevent insincere applicants from causing a "gold rush" and subsequent processing backlog.

47. Commenters on both sides oppose the Commission's proposal regarding specific time-of-day provisions for ITFS access to MDS-licensed facilities. ITFS operators assert that their operations are not restricted to daytime hours and that they are not likely to have success negotiating the evening hours often required for ITFS purposes. WCA submits that unless part-time ITFS channels can be channel-mapped so as to give the appearance of full-time channels, they have very little value to a wireless cable operator. WCA argues that with less restrictive regulation of commercial access, the Commission can spur the construction of facilities for shared use by wireless cable and local educators.

48. Both ITFS and MDS commenters also oppose the Commission's proposal that wireless cable licensees provide up to four receive sites for each channel used by an ITFS entity. ITFS entities find the proposal too limited and MDS entities argue that it is too costly. Rocky Mountain, an ITFS entity, argues that the proposal will only be useful to entities seeking to serve specific sites at limited times. WCA argues that the proposal does not limit the number of ITFS entities who could claim an entitlement to receive site construction. It contends that the cost of the equipment is minimal and that by requiring the local educator to expend some funds for ITFS access, the Commission can prevent frivolous requests for airtime from local educators who have little actual interest in using or capability to use the ITFS spectrum for educational purposes.[31]

49. **Resolution.** We believe that the rules specified below will spur further development of the wireless cable industry while at the same time benefitting the educational community and protecting long-term ITFS growth. *See Further Notice* at 6475. Utilization of available ITFS frequencies by wireless cable ventures can provide valuable service to the public, creating a potential for multichannel video, either as a new service or a competitor to existing hardwire service, in many areas where it could not otherwise develop. Moreover, we believe that our initiative will encourage ITFS use of currently unemployed spectrum by facilitating the construction of additional MDS systems. Once an MDS system is operating on ITFS frequencies, for example, ITFS entities will be able to gain access to those facilities for the provision of ITFS programming. Similarly, to the extent an MDS system becomes a viable operation through its use of ITFS frequencies, it may well be interested in leasing excess capacity from existing ITFS licensees operating on other ITFS channels. We also note that, under the new rules specified below, a significant number of ITFS channels will be preserved in each community expressly to accommodate future ITFS use. ITFS systems currently being planned will therefore have an ample opportunity to continue to develop.

50. The ITFS commenters who oppose this proposal have not demonstrated that carefully prescribed use of available ITFS frequencies by wireless cable entities will significantly impair or restrict any reasonably foreseeable ITFS use. It is unclear how schools can lose potential leasing revenues where no stations yet exist; moreover, under the current rules, the areas in question are unlikely to attract wireless cable entities as lessees because there are few or no current ITFS operators or applicants from which to lease excess capacity. We note some commenters' concern that the ITFS entity's right of access will not be meaningful because wireless cable parties will construct systems not amenable to ITFS use (*i.e.*, the wireless cable operator will locate its transmitter so as to reach the maximum number of subscribers rather than specific receive sites). On the contrary, we expect that the vast majority of, if not all, ITFS uses will be accommodated. Wireless cable operators will generally construct facilities with the widest reach possible, thereby maximizing the number of likely ITFS reception sites that could be reached.

51. Moreover, we are not persuaded that our actions here are ill-advised simply because they are characterized by some commenters as constituting a "reallocation" of ITFS spectrum. We believe that the detailed provisions we describe here governing the use of ITFS spectrum by wireless cableentities demonstrate that our decision does not amount to a reallocation in any traditional sense. It does not, for example, admit a new class of users to the exclusion of the existing class of users. Rather, the decision expands, in carefully tailored circumstances and subject to very explicit conditions, the class of eligible users. In so doing, it undertakes to create a shared and symbiotic use of spectrum, where the new users are obligated to provide access to and facilities for existing users. We note in this connection that ITFS entities will have access to the same number of hours as they have typically retained for their own use when leasing excess capacity to MDS operators. Further, there are a host of protective provisions intended to ensure that ITFS entities are not disadvantaged by our decision to directly license wireless cable entities on ITFS spectrum. Not the least of these is the absolute requirement that substantial ITFS spectrum be vacant and available for future ITFS needs before any licensing of non-ITFS entities will be undertaken. Under these conditions, we find the licensing of wireless cable entities on ITFS frequencies, regardless of its characterization, to serve the public interest.[32]

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[31] In addition, Rocky Mountain notes that eligible ITFS applicants depend heavily on PTFP grant support and timely file in accord with the NTIA cycle. It argues that unless filing windows are coordinated with NTIA, the "priority" given to ITFS applicants for vacant channels may be meaningless. While we do not currently coordinate filing windows with NTIA, we accept the likelihood of PTFP funding as an adequate financial showing, so this should not be a concern.

[32] To the extent that our actions might be deemed to constitute a reallocation, we note that our decision in this proceeding has been taken only after notice and a full opportunity for com-

52. Several of the provisions advanced in the *Further Notice* can be implemented as proposed. First, the proposals regarding the number of available ITFS channels that will be subject to wireless cable use will be adopted as follows:

(a) A minimum of eight of the twenty channels allocated to ITFS must be preserved for future ITFS use in any community in which a wireless cable entity[33] applies for ITFS frequencies.[34]

(b) A maximum of eight of the twenty ITFS channels can be licensed to a wireless cable entity in any community.

(c) Mutually exclusive applications by wireless cable entities for ITFS channels will be governed by MDS mutual exclusivity rules and MMDS random selection procedures.

Consistent with our previously stated commitment to ITFS service, this rule will not permit the last remaining ITFS channels in any given area to be used by wireless cable entities. *See Further Notice, supra,* at 6475. Thus, at least two educational institutions or entities in each community, in addition to any that already have facilities, will be able to apply for their own ITFS facilities in the future. These provisions not only strike a reasonable compromise between the need for future ITFS capacity and the need for access to facilities by wireless cable systems, but also roughly correspond to the strengths of those needs as the number of available channels changes. In cases where there is little or no current ITFS activity, there is a greater volume and variety of unfulfilled educational opportunities, and more than eight channels would be preserved to accommodate future users. In other words, the more ITFS channels already operating, the greater the opportunity for a wireless cable system to lease excess capacity; the fewer ITFS channels operating, the greater the need for wireless cable entities to institute MDS service on ITFS channels.[35]

53. In conjunction with the above provisions, we will also provide ITFS entities with the right to demand access to wireless cable facilities licensed on ITFS frequencies.[36] ITFS access to ITFS channels licensed to wireless cable entities shall be made as follows:

(a) An educational institution or entity that would be eligible for ITFS facilities that are licensed to a wireless cable entity may demand access to those facilities, subject to conditions further described below.[37]

(b) Only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity.

The access provisions allow for ITFS operation on all ITFS frequencies if the demand for ITFS service ultimately warrants the use of all channels. At the same time, the outer limits of a wireless cable operator's exposure to liability are measurable, so that it can make a reasonable judgment as to whether a wireless cable system dependent on ITFS channels would be viable.

54. Next, we will provide that only wireless cable entities offering a reasonable expectation of prompt wireless cable service will be able to apply for licenses for ITFS frequencies:

(a) A wireless cable applicant must hold a conditional license, a license or a lease, or must have filed an unopposed application (*see* note 17, *supra)* for at least four MDS channels to be used in conjunction with the facilities proposed on the ITFS frequencies.

(b) A wireless cable applicant must show that there are no unused MDS channels available for application, purchase or lease that could be used in lieu of the ITFS frequencies applied for.

(c) A wireless cable entity may apply for ITFS frequencies at the same time it applies for the related MDS frequencies, but if that MDS application is

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ment, as required by the Administrative Procedure Act in rulemaking proceedings, 5 U.S.C. § 553, and after a full evaluation of which course of action best serves the public interest.

[33] For these purposes, wireless cable entities are MDS/MMDS licensees and operators who lease channels from MDS/MMDS licensees.

[34] A channel will be considered available for future ITFS use if there are no co-channel operators or applicants within 50 miles of the transmitter site of the proposed wireless cable operation, and if the transmitter site remains available for use at reasonable terms by new ITFS applicants on those channels within three years of commencing operation. Future operators need not be given unconditional access to the site; leasing arrangements are acceptable.

[35] For example, where ITFS licensees operate 10 channels in a given community, the eight-channel preservation requirement would leave only two channels available for wireless cable use, since eight must be maintained for future ITFS use. By contrast, where no educational entities in a community have instituted ITFS service or applied for facilities, the eight-channel limitation on wireless cable use would effectively preserve 12 channels for future ITFS users, since an MDS operator may apply for no more that eight of the 20 ITFS channels in that community. We note that an STL on an ITFS frequency is a secondary service, *i.e.*, it can be displaced (without compensation or other consideration) by an ITFS facility that will directly serve receive sites. This makes STL channels "available" to potential ITFS applicants for purposes of the eight-channel ITFS reservation. They are not available, however, for direct displacement by wireless cable entities, although they can be modified under the same terms as specified for involuntary migration of point-to-point ITFS facilities on the E and F channels (*see* paras. 32-33, *supra).*

[36] Wireless cable entities licensed on ITFS channels can use channel mapping technology to facilitate the provision of adequate access to these channels by ITFS entities and to promote efficient spectrum/channel utilization.

[37] Such request for access will be made by application to the Commission on FCC Form 330 for a determination as to eligibility, with a copy served on the subject wireless cable licensee. An applicant for access must fill out Sections I, II, III and IV of the ITFS application Form 330. Section I, question 1 should be answered by spelling out," For access to existing facilities." Section I, question 2b should include the name of the wireless cable licensee or applicant. Normal ITFS cutoff rules (47 C.F.R. § 74.911) will be followed. If there are competing requests for access, the ITFS comparative process (47 C.F.R. § 74.913) will be used.

opposed by a timely filed mutually exclusive application or petition to deny, the application for ITFS facilities will be returned. (That entity can, of course, reapply for ITFS facilities, if still available, upon grant of its MDS application(s)).

(d) A wireless cable entity licensed on ITFS channels will be subject to the MDS one-year construction requirement.

These provisions will avoid the preemption of new ITFS services by wireless cable applications that are unlikely to result in a viable wireless cable service. They also effect a reasonable compromise between the need for new wireless cable operators in a community to apply for entire systems at once and the need to avoid taking ITFS channels out of circulation for extended periods of time, during which no benefit is provided to the public. We believe that these safeguards will ensure that wireless cable parties do not file for ITFS channels simply to impede the development of ITFS systems in the area.

55. As detailed at paragraph 53, *supra*, ITFS entities have the right to demand access to wireless cable facilities licensed on ITFS frequencies. In order to provide potential wireless cable operators and ITFS access users a degree of certainty with respect to both financial exposure and scheduling/use expectations, the rights of an ITFS entity that is entitled to access are carefully delineated as follows:

(a) An ITFS-eligible entity[38] determined to have right of access to wireless cable licensed facilities may have access to up to 40 hours per channel per week. The ITFS entity has the unqualified right to demand and designate 20 of those hours as follows:

(1) Three hours of the ITFS entity's choice each day, Monday through Friday, between 8:00 a.m. and 10:00 p.m., excluding holidays and school vacations; and

(2) The remaining five hours, any time of the ITFS entity's choice, between 8:00 a.m. and 10:00 p.m., Monday through Saturday.

We emphasize that while an ITFS entity is entitled to the above distribution of hours, it may choose to use different hours (*see* (h), below).

(b) When no other vacant channels are available to an ITFS access user, it will have a right of access to the second 20 hours. No time-of-day or day-ofweek obligations will be imposed on either party with respect to the second 20 hours of access time.

(c) The ITFS user must provide the wireless cable licensee with its planned schedule of use four months in advance.

(d) No minimum amount of programming will be required of an ITFS operator seeking access to one channel; for access to a second channel, the ITFS entity must use at least 20 hours per week on the first channel from 8:00 a.m. to 10:00 p.m., Monday through Saturday; for access to a third channel, the ITFS entity must use at least 20 hours per week on the first channel and on the second channel during the hours prescribed above, and so on. Access will not be granted to a single entity for more than four channels, unless it can satisfy the waiver provisions related to the four-channel limitation in the ITFS rules (47 C.F.R. § 74.902(d)).

(e) When an ITFS entity is granted access to an ITFS channel of a wireless cable licensee, the wireless cable licensee will be required to pay half of the cost of five standard receive sites on that channel.

(f) During the first three years that the wireless cable operator is licensed, the wireless cable entity may, as an alternative to providing access to its own facilities, pay the costs of an application and facility construction for such ITFS entity on other available ITFS channels (including half of the cost of five receive sites per channel). In the event such an ITFS application is contested, the ITFS entity may elect access to the existing MDS facilities. We reiterate that only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. *See* para. 53(b), *supra*.

(g) After a wireless cable entity licensed to use ITFS channels has been in operation for three years, it will not be required to grant new or additional access to such ITFS channels, or provide any alternative facilities to any ITFS entity seeking access to its facilities, if there are suitable ITFS frequencies available for the ITFS entity to build its own system.[39] If there are no other available ITFS frequencies in the area, even after the wireless cable entity has been operating for three years, an ITFS entity will be entitled to access to the wireless cable entity's ITFS facilities, under terms described above.

(h) The parties may mutually agree to modify any requirements or obligations imposed by these provisions (including the time of day and minimum hours per day requirements specified in (a), above), except for the requirement that an ITFS entity use

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[38] ITFS eligibility criteria are set out in Section 74.932(a) of the Commission's Rules, as follows:

(a) A license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

[39] If an ITFS operator entering an access agreement with a wireless cable entity plans to seek additional hours of access after the wireless cable entity has been in operation for three years, it should so indicate in the access agreement. Again, only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. *See* para. 53(b), *supra*.

at least 20 hours per week on a channel of a wireless cable licensee before requesting access to an additional channel.

These provisions establish a specific framework within which ITFS access to wireless cable facilities licensed on ITFS channels can be implemented. They provide ample opportunity and flexibility for ITFS use of the ITFS frequencies, when no other practical means of implementing ITFS service are available. They also prevent one or two ITFS entities from exhausting all of the access rights on a limited amount of educational programming by requiring a 20-hour minimum before the ITFS entity may request additional channels. At the same time, they provide potential wireless cable operators and ITFS users a degree of certainty with respect to both financial exposure and scheduling/use expectations. They also provide some flexibility to MDS operators who wish to persuade ITFS access users to modify their use to better suit the wireless cable licensee's needs. For instance, the time-of-day and day-of-week requirements on the first 20 hours of access can be negotiated if the ITFS operator so chooses, and there are no time-of-day or day-of-week restrictions on the second 20 hours.[40] We emphasize that we expect parties to act in good faith and to maximize the use of the channels in question to benefit all operators involved. Moreover, an ITFS access user can demand access to more than 20 hours on a channel only where there is absolutely no capacity for it to expand its ITFS service by the use of other ITFS channels. In addition, the wireless cable operator has the flexibility to avoid disturbance of its own operation altogether by building separate facilities for the ITFS entity, which the wireless cable entity may be able to lease back, further enhancing its own system. While these provisions offer assistance to ITFS operators in building ITFS facilities, either on the MDS entity's ITFS channels or other available ITFS channels, some serious commitment from the ITFS entity is also required (*i.e.*, partial expenses for its receive sites) to ensure that the ITFS entity legitimately intends to provide ITFS service on the facilities. Moreover, the three-year requirement provides the MDS entity with some degree of certainty as to the extent to which they could be responsible for providing access or facilities when channels are otherwise available for direct application by ITFS entities.

56. When a wireless cable operator seeks to be licensed on ITFS frequencies, our procedural rules will emphasize public notice to local educational institutions and entities, and will provide for the absolute primacy of ITFS applications vis-a-vis wireless cable applications where the two may be mutually exclusive. We will not, however, permit ITFS applicants to preempt wireless cable applicants when other ITFS frequencies are available for their use:

(a) A wireless cable applicant for ITFS channels will file Sections I and V of FCC Form 330, with a complete FCC Form 494 appended. A cover letter will clearly indicate that the application is for a wireless cable entity to operate on ITFS channels.

(b) An application for available ITFS frequencies filed by a wireless cable applicant will be subject to a same-day cut-off period with respect to other wireless cable applicants and a 60-day cut-off period with respect to ITFS applicants. (See 47 C.F.R. §§ 21.914, 74.911.) All cut-off lists for ITFS frequencies, regardless of the nature of the applicant, will be published as ITFS public notices.

(c) Wireless cable applicants for ITFS frequencies will publish local public notice as prescribed in new Section 74.991 of the Commission's rules.

(d) If an ITFS application and a wireless cable application for ITFS facilities are mutually exclusive, the ITFS application will be granted if the applicant is qualified.

(e) An ITFS applicant may not file an application mutually exclusive with a wireless cable application if there are other ITFS channels available for the proposed ITFS facility. If another party has applied for the channels in question, those channels will be considered unavailable.

If permitting wireless cable entities to use ITFS channels is to be of any practical use, potential wireless cable ventures must have some degree of certainty that applications, once filed, can be granted and services, once initiated, can continue. These provisions provide that level of protection without unduly restricting ITFS applicants. Wireless cable applications will only be filed where there are ample available channels to begin with; such applications would be unreasonably discouraged if they could be readily negated by competing ITFS applications. Moreover, in those areas with multiple available ITFS channels, the wireless cable entity often could simply refile for other available ITFS channels, an unnecessarily wasteful procedure. In those cases where an ITFS entity has no other channels for which to apply, however, the ITFS needs for the ITFS-allocated frequencies will prevail over the wireless cable needs. In addition, the local public notice provision, a minimally burdensome requirement, is consistent with our determination to provide local educational entities and institutions an opportunity to secure their rights. The disparate cut-off periods are appropriate to the respective classes of applicants, according to the procedural rules for each service. Once a wireless cable applicant achieves cut-off status, it will be treated as a primary service provider.

57. Finally, we will provide wireless cable licensees operating on ITFS frequencies with an MDS protected service area while affording receive site protection to ITFS access users of such facilities:

(a) The interference protection provided wireless cable applicants and licensees of ITFS facilities will be that described in Section 21.902(d) of the Commission's rules.

(b) ITFS users of wireless cable channels licensed on ITFS frequencies will be protected from interference at individual receive sites.

[40] As we have stated in the past, ITFS applicants should request only those facilities necessary to fulfill their educational goals. *See Report and Order* at 6416.

The receive site based protection afforded ITFS licensees would not be appropriate for wireless cable entities licensed on ITFS channels. A wireless cable system uses omnidirectional facilities to reach as many subscribers as possible rather than point-to-point facilities to reach specific receive sites. Moreover, such facilities will be colocated with and used in conjunction with MDS-licensed facilities and other ITFS facilities that will have identical technical characteristics and serve the same customers. Interference protection equivalent to that afforded MDS facilities (*i.e.*, service area based protection) is therefore essential. Different protection standards for wireless cable enitites and ITFS entities on ITFS frequencies should not be overly troublesome, as similar interservice coordination is already required for co-channel and adjacent-channel operations involving the D, E, F and G channels. Of course, an MDS entity afforded circular protection pursuant to this provision must protect preexisting MDS and ITFS licensees, conditional licensees, permittees and applicants from interference. Educational entities that acquire access to ITFS frequencies licensed to wireless cable entities will be afforded the same protection as other ITFS entities (*i.e.*, receive site based protection). This will protect an ITFS entity that has distant receive sites without detriment to the wireless cable entity from which it receives access.

58. These provisions collectively should ensure that there is little negative impact on the future provision of ITFS service resulting from the beneficial utilization of ITFS frequencies by wireless cable operators as a result of this rulemaking. To the contrary, we expect that in many instances, ITFS service will be initiated where it would not have otherwise developed. At the same time, these provisions give wireless cable operators a reasonable opportunity to use available ITFS channels while retaining our own oft-repeated commitment to the development of ITFS.

III. PROCEDURAL MATTERS

59. Pursuant to the Regulatory Flexibility Act of 1980, the Final Regulatory Flexibility Analysis for this item is attached as Appendix A.

60. The Secretary shall send a copy of this *Second Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 4 U.S.C. § 601, *et seq.* (1981)).

61. For additional information on this proceeding, contact Jane Hinckley, Mass Media Bureau, (202) 632-7792.

IV. ORDERING CLAUSES

62. IT IS THEREFORE ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Parts 21, 74 and 94 of the Commission's Rules, 47 C.F.R. §§ 21, 74, 94, ARE AMENDED as set forth in Appendix C, below.

63. IT IS FURTHER ORDERED that the amendments to 47 C.F.R. Parts 1, 2, 21, 74 and 94 adopted in this *Second Report and Order* will be effective **January 2, 1992,** pending approval by the Office of Management and Budget.

64. IT IS FURTHER ORDERED that OFS applications for new or modified H channel facilities filed after **September 26, 1991,** and before **January 2, 1992,** will be returned as unacceptable.

65. IT IS FURTHER ORDERED that Gen. Docket No. 90-54 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
Final Regulatory Flexibility Analysis

I. Need for and Purpose of this Action:

1. This action is taken to simplify and update, where possible, the disparate technical, procedural, ownership and other requirements and restrictions applicable to MDS/MMDS, OFS and ITFS stations so as to facilitate wireless cable service.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

2. One commenter filed comments in response to the Initial Regulatory Flexibility Analysis. Frederick L. Spaulding submits that the Initial RFA understates the number and type of small entities affected, particularly ITFS entities.

III. Significant Alternatives Considered and Rejected:

3. The Commission considered reallocating 25 percent of the ITFS response channels to OFS. Several commenters argued that all the ITFS response channels are necessary for interactive instruction via ITFS. We agree that two-way communication can greatly enhance distance learning, and we conclude that all the response channels should remain allocated to ITFS.

4. The Commission also considered expanding the list of modifications for which prior Commission authorization is not required, as set out in Section 21.42 of the Commission's Rules. We conclude that it has not been shown that Section 21.42 can be modified without the potential for increasing harmful interference to other parties.

5. The Commission additionally considered creating an exception to the rule preventing a cable operator from controlling a wireless cable system in its franchise area for non-rural areas that would otherwise remain unserved. We conclude that the record does not show that such an exception is necessary.

APPENDIX B
List of Commenters

Initial Comments[41]

1. American Petroleum Institute
2. Archdiocese of Los Angeles/Pace Telecommunications Consortium
3. Archdiocese of New York
4. Arizona Board of Regents, *et al.*
5. Association of American Railroads
6. Association for Higher Education of North Texas, *et al.*
7. Cable Operators and Associations
8. Catholic Television Network
9. Fort Wayne Telsat, Inc.
10. Hispanic Information and Telecommunications Network, Inc. (HITN)
11. Ana G. Mendez Educational Foundation, *et al.*
12. Microband Companies, Inc.
13. Mitchell Communications Corp.
14. Multi-Channel MDS, Inc.
15. Multimedia Cablevision, Inc.
16. National Cable Television Association, Inc. (NCTA)
17. National ITFS Association
18. National Telephone Cooperative Association (NTCA)
19. Oklahoma City University
20. Oklahoma Western Telephone Company
21. Omega Communications, Inc.
22. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
23. Phase One Communications, Inc.
24. Reuters Information Services, Inc.
25. Rocky Mountain Corporation for Public Broadcasting
26. Roman Catholic Communications Corporation
27. Frederick L. Spaulding, P. E.
28. Tangent TV Cable Company
29. Tele-Communications, Inc. (TCI)
30. Times Mirror Cable Television, Inc.
31. Tribune Regional Programming
32. United States Catholic Conference
33. United States Telephone Association (USTA)
34. University of Maryland
35. Wireless Cable Association, Inc. (WCA)

Reply Comments

1. American Association of Community and Junior Colleges, *et al.*
2. American Petroleum Institute
3. Archdiocese of Los Angeles/Pace Telecommunications Consortium
4. Association for Higher Education of North Texas, *et al.*
5. B. F. Investments, Inc.
6. Honorable Jeff Bingaman
7. Honorable Hank Brown
8. Honorable Ben Nighthorse Campbell
9. Honorable William L. Clay
10. Honorable Larry E. Craig
11. Honorable Alan Cranston
12. Honorable John Danforth
13. Honorable Pete V. Domenici
14. Honorable Jake Garn
15. Honorable Orrin G. Hatch
16. Home Box Office, Inc. (HBO)
17. Long Beach Unified School District
18. Honorable Richard D. Lugar
19. Honorable Thomas J. Manton
20. Ana G. Mendez Educational Foundation, *et al.*
21. Honorable Daniel P. Moynihan
22. Multimedia Cablevision
23. National Cable Television Association, Inc. (NCTA)
24. North American Catholic Educational Programming Fndn., Inc.
25. Honorable Henry J. Nowak
26. Honorable Harry Reid
27. Reuters Information Services, Inc.
28. Honorable James H. Scheuer
29. Honorable Steven Schiff
30. Honorable Alan K. Simpson
31. Honorable Joe Skeen
32. Honorable Steve Symms
33. Honorable Strom Thurmond
34. Toledo Telephone Company, Inc.
35. Honorable Edolphus Towns
36. Tribune Regional Programming, Inc.
37. University of Maryland
38. Honorable Malcolm Wallop
39. Wireless Cable Association, Inc. (WCA)

[41] In addition to the comments listed, the Archdiocese of San Francisco, the Diocese of Oakland, the Diocese of San Bernadino, Moreau High School, California State University, Fullerton, and KLVX, Las Vegas, Nevada, filed comments after the comment period expired. Their filings have been incorporated as informal comments in this proceeding.

APPENDIX C
Rule Changes

Parts 1, 2, 21, 74and 94 of Title 47 of the U. S. Code Of Federal Regulations are amended to read as follows:

1. The Authority Citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.824 is amended by revising the title and paragraphs (a) and (b) to read as follows:

§ 1.824 Random selection procedures for Multichannel Multipoint Distribution Service and Multipoint Distribution Service H-Channel stations.

(a) If there are mutually exclusive applications for an initial conditional license or license, the Commission may use the random selection process to select the conditional licensee or licensee. Each such random selection shall be conducted under the direction of the Office of the Managing Director in conjunction with the Office of the Secretary. Following the random selection, the Commission shall announce the tentative selectee and determine whether the applicant is qualified to receive the conditional license or license. If the Commission determines that the tentative selectee is qualified, it shall grant the application. In the event that the tentative selectee's application is denied, a second random selection will be conducted. Petitions for Reconsideration, Motions to Stay or Applications for Review may be submitted at the time the Commission grants or denies the application of the tentative selectee. The filing periods specified in the rules shall apply for such pleadings.

(b) Competing applications for conditional licenses and licenses shall be designated for random selection in accordance with Sections 1.1621, 1.1622(a), (b), (c), (d), and (e), and 1.1623. No preferences pursuant to Section 1.1622(b)(2) or (b)(3) shall be granted to any MMDS or MDS H-channel applicant whose owners, when aggregated, have an ownership interest of more than fifty percent in the media of mass communication whose service areas, as set forth at Section 1.1622(e)(1) through (e)(7), wholly encompass or are encompassed by the protected service area contour, computed in accordance with Section 21.902(d), for which the license or conditional license is sought.

* * * * *

3. The Authority Citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

4. Section 2.106 is amended by revising footnote NG47 to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

NG47 In the band 2500-2690 MHz, channels 2500-2686 MHz, and the corresponding response frequencies 2686.0625-2689.8125 MHz, may be assigned to stations in the Instructional Television Fixed Service (Part 74 of this Chapter); channels in 2596-2680 MHz, and response frequencies 2686.5625-2687.6875 MHz may be assigned to Multipoint Distribution Service stations (Part 21 of this Chapter); and frequencies in the 2686.875-2687, 2687.875-2688, 2688.5-2688.75 and 2688.875-2689.75 MHz bands may be assigned to stations in the Operational Fixed Service (Part 94 of this Chapter). In Alaska, however, frequencies within the band 2655-2690 MHz are not available for assignment to terrestrial stations.

* * * * *

5. The Authority Citation for Part 21 continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 313, 314, 403, 602; 47 U.S.C. 552.

6. Section 21.11 is amended by revising paragraphs (a), (d) and (f) to read as follows:

§ 21.11 Miscellaneous forms shared by all domestic public radio services.

(a) *Licensee qualifications.* FCC Form 430 ("Licensee Qualification Report") must be filed annually, no later than March 31 for the end of the preceding calendar year, by licensees for each radio service authorized under this part, if service was offered at any time during the preceding year. Each annual filing must include all changes of information required by FCC Form 430 that occurred during the preceding year. In those cases in which there has been no change in any of the required information, the applicant or licensee, in lieu of submitting a new form, may so notify the Commission by letter. All Multipoint Distribution Service non-common carrier licensees must annually file FCC Form 430.

* * * * *

(d) *Assignment of license.* FCC Form 702 ("Application for Consent to Assignment of Radio Station Construction Authorization or License for Stations in Services Other than Broadcast") must be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment (or transfer of control) the application must be filed within 10 days of the event causing the assignment (or transfer of control). FCC Form 702 must also be used for non-substantial (*pro forma)* assignments. In addition, FCC Form 430 ("Licensee Qualification Report") must be submitted by the proposed assignee unless such assignee has a current and substantially accurate report on file with the Commission. Whenever a group of

station licenses in the same radio services are to be assigned to a single assignee, a single "blanket" application may be filed to cover the entire group, if the application identifies each station by call sign and station location and if two copies are provided for each station affected. The assignment must be completed within 45 days from the date of authorization. Upon consummation of an approved assignment, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

* * * * *

(f) *Transfer of control of corporation holding a conditional license or license.* FCC Form 704 ("Application for Consent to Transfer of Control") must be submitted in order to voluntarily or involuntarily transfer control (*de jure* or *de facto)* of a corporation holding any conditional licenses or licenses. FCC Form 704 must also be used for non-substantial (*pro forma)* transfers of control. In addition, FCC Form 430 ("Licensee Qualification Report") must be submitted by the proposed transferee unless said transferee has a current and substantially accurate report on file with the Commission. The transfer must be completed within 45 days from the date of authorization. Upon consummation of an approved transfer, the Commission must be notified by letter of the date of consummation within 10 days of its occurrence.

7. Section 21.23 is amended by adding "or Multipoint Distribution Service Hchannel" after "MMDS" in paragraphs (a) and (b).

8. Section 21.30 is amended by adding "or for Multipoint Distribution Service H-channel stations" after "Multichannel Multipoint Distribution Service" in paragraph (a)(4).

9. Section 21.33 is amended by revising paragraph (a) to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for a license in the Multichannel Multipoint Distribution Service (MMDS), or for Multipoint Distribution Service H-Channel stations, or in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of Section 21.31(b) of this Part, and if an MMDS or MDS H-channel application satisfies Section 21.914 of this Part, the applicants may be included in the random selection process set forth in Part 1, Sections 1.821 through 1.825 of this Chapter. Renewal applications shall not be included in a random selection process.

* * * * *

10. Note 6 of Section 21.101 is revised to read as follows:

* * * * *

[6] Beginning November 1, 1991, equipment authorized to be operated in the frequency bands 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz for use in the Multipoint Distribution Service shall maintain a frequency tolerance within ± 1 KHz of the assigned frequency.

* * * * *

11. Section 21.107 is amended by revising footnote 1 to the table in paragraph (b) to read as follows:

* * * * *

[1] In the 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz frequency bands, when used for the Multipoint Distribution Service, EIRP up to 2000 watts may be authorized pursuant to Section 21.904 of this Part.

* * * * *

12. Section 21.307 is amended by revising paragraphs (a), (b), (b)(4), (c)(1), (c)(1)(i), (c)(1)(i)(B), (c)(2)(i)(A), (c)(2)(i)(G), (c)(2)(ii)(A), a portion of the first sentence in paragraph (c)(2)(iii)(A), paragraphs (d)(1), (d)(1)(ii), (e)(1), (e)(1)(i), (e)(1)(ii), (e)(1)(iii), (e)(1)(iv), (e)(2), (f)(1), and (f)(2)(i) to read as follows:

§ 21.307 Equal employment opportunities.

(a) *General policy.* Equal opportunities in employment must be afforded by all common carrier and Multipoint Distribution Service non-common carrier licensees or conditional licensees to all qualified persons, and no personnel shall be discriminated against in employment because of sex, race, color, religion, or national origin.

(b) *Equal employment opportunity program.* Each licensee or conditional licensee must establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of employment policy and practice. Under the terms of its program, a licensee or conditional licensee must:

(1) * * *

(2) * * *

(3) * * *

(4) Conduct a continuing campaign to exclude every form of prejudice or discrimination based upon sex, race, color, religion, or national origin, from the licensee's or conditional licensee's personnel policies and practices and working conditions.

(5) * * * * *

(c) *Additional information to be furnished to the Commission.*

(1) Equal Employment Programs to be filed by common carrier and Multipoint Distribution Service non-common carrier licensees and conditional licensees:

(i) All licensees or conditional licensees must file a statement * * *

(A) * * *

(B) If a licensee or conditional licensee has fewer than 16 full-time employees, no such statement need be filed.

(2) * * *

(i) *To assure nondiscrimination in recruiting.*

(A) Posting notices in the licensee's or conditional licensee's offices * * *

* * * * *

(G) Making known to the appropriate recruitment sources in the employer's immediate area that qualified minority members are being sought for consideration whenever the licensee or conditional licensee hires.

(ii) *To assure nondiscrimination in selection and hiring.*

(A) Instructing personally those on the staff of the licensee or conditional licensee who make hiring decisions that all applicants for all jobs are to be considered without discrimination.

(B) * * *

(C) * * *

(iii) *To assure nondiscriminatory placement and promotions.*

(A) Instructing personally those of the licensee's or conditional licensee's staff * * *

* * * * *

(d) *Report of complaints filed against licensees and conditional licensees.*

(1) All licensees or conditional licensees must submit an annual report to the FCC no later than May 31 of each year indicating whether any complaints regarding violations by the licensee or conditional licensee or equal employment provisions of Federal, State, Territorial, or local law have been filed before anybody having competent jurisdiction.

(i) * * *

(ii) Any licensee or conditional licensee who has filed such information with the EEOC need not do so with the Commission, if such previous filing is indicated.

(e) *Complaints of violations of Equal Employment Programs.*

(1) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee will be considered by the Commission in the following manner:

(i) If a complaint raising an issue of discrimination is received against a licensee or conditional licensee who is within the jurisdiction of the EEOC, it will be submitted to that agency. The Commission will maintain a liaison with that agency which will keep the Commission informed of the disposition of complaints filed against any of the common carrier or Multipoint Distribution Service noncommon carrier licensees or conditional licensees.

(ii) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee who does not fall under the jurisdiction of the EEOC but is covered by appropriate enforceable State law, to which penalties apply, may be submitted by the Commission to the respective state agency.

(iii) Complaints alleging employment discrimination against a common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee who does not fall under the jurisdiction of the EEOC or an appropriate state law, will be accorded appropriate treatment by the FCC.

(iv) The Commission will consult with the EEOC on all3 matters relating to the evaluation and determination of compliance with the common carrier and Multipoint Distribution Service non-common carrier licensees or conditional licensees with the principles of equal employment as set forth herein.

(2) Complaints indicating a general pattern of disregard of equal employment practices which are received against a licensee or conditional licensee who is required to file an employment report to the Commission under Section 1.815(a) of the Chapter, will be investigated by the Commission.

(f) *Records available to the public.*

(1) *Commission records.* A copy of every annual employment report, equal employment opportunity programs, and reports on complaints regarding violations of equal employment provisions of federal, state, territorial, or local law, and copies of all exhibits, letters, and other documents filed as part thereof, all amendments thereto, all correspondence between the conditional licensee or licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference, are open for public inspection at the offices of the Commission.

(2) *Records to be maintained locally for public inspection by licensees or conditional licensees.*

(i) *Records to be maintained.* Each common carrier or Multipoint Distribution Service non-common carrier licensee or conditional licensee required to file annual employment reports, equal employment opportunity programs, and annual reports on complaints regarding violations of equal employment provisions of federal, state, territorial, or local law must maintain, for public inspection, in the same manner and in the same locations as required for the keeping and posting of tariffs as set forth in Section 61.72 of this Chapter, a file containing a copy of each such report and copies of all exhibits, letters, and other documents filed as part thereto, all correspondence between the conditional licensee or licensee and the Commission pertaining to the reports after they have been filed and all documents incorporated therein by reference.

(ii) * * *

13. Section 21.900 is amended by adding "or for a Multipoint Distribution Service H-channel station" after "Service" in the last sentence in the last paragraph and by substituting "must" for "shall".

14. Section 21.901 is amended by revising the first and last sentences of paragraph (a), by revising paragraphs (b)(4) and (b)(5), by adding paragraph (b)(6), and by adding paragraph (f) to read as follows:

§ 21.901 Frequencies.

(a) Frequencies in the bands 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz are available for assignment to fixed stations in this service. ***

The response channels E1, E2, F1, and F2 listed in Section 74.939(d) of this Chapter are grandfathered for fixed stations in this band and are shared with Instructional Television Fixed Service Stations licensed under Part 74 of the Commission's Rules; the existing response channels E3, E4, F3, and F4 listed in Section 74.939(d) of this Chapter are grandfathered and licensed under Part 21 of the Commission's Rules.

* * * * *

15. Section 21.901(b) is modified by revising paragrpahs (4) and (5) and by adding paragraph (6) to read as follows:

§ 21.901 Frequencies.

(a)* * *

(b)* * *

(4) At 2596-2602 MHz, 2608-2614 MHz, 2620-2626 MHz, and 2632-2638 MHz (designated as channels E1, E2, E3, and E4, respectively, with the four channels to be designated the E-group channels), and response channels E1 and E2 (1) listed in § 74.939(d),[1] or

(5) At 2602-2608 MHz, 2614-2620 MHz, 2626-2632 MHz, and 2638-2644 MHz (designated as channels F1, F2, F3, and F4, respectively, with the four channels to be designated the F-group channels), and response channels F1 and F2 listed in § 74.939(d),[1] or

(6) At 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz (designated as channels H1, H2 and H3, respectively, with the three channels to be designated the H-group channels).[1]

Notes:

[1] No response channels are proveded for channels E3, E4, F3, F4, H1, H2, and H3.

16. Section 21.901(f) is added to read as follows:

§ 21.901 Frequencies.

* * * * *

(f) *MDS H-channel applications.* Frequencies in the bands 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz must be assigned only in accordance with the following conditions:

(1) All applications for H-channel MDS stations at 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz frequency bands must be filed in each area by only a single applicant, either directly or indirectly. The stockholders holding more than one percent of an entity's stock, the partners, the owners, the trustees, the beneficiaries, the officers, the directors, or any other person or entity holding a similar cognizable interest in the applicant for, or conditional licensee, or licensee of, a station for the 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz frequency bands in any area, must not have, either directly or indirectly, a similar cognizable interest in the applicant for, or conditional licensee, or licensee of, a station for the same 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz frequency band in the same area.

(2) All applicatns for H-channel MDS stations at frequencies in the bands 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz must specify either the H1, H2, or H3 channel for which an application is filed; however, the Commission may on its own initiative assign different channels in these frequency bands if it is determined that such action would serve the public interest.

17. Section 21.902(f)(2) is amended by replacing "2596-2680 frequency band" with "2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz frequency bands".

18. Section 21.902(i)(1) is revised to read as follows:

§ 21.902 Frequency interference.

* * * * *

(i) (1) For each application for stations in the 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz frequency bands filed on or after December 30, 1991, the applicant must submit an analysis demonstrating that operatoin of the applicant's transmitter will not cause harmful interference to any existing, cochannel and adjacent-channel E-channel, F-channel, or G-channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized, with a transmitter site within 50 miles fo the coordinates of the Multichannel Multipoint Distribution Service (MMDS) or MDS H-channel station's proposed transmitter site.

* * * * *

19. Section 21.902(i)(2)(A) and (B) are revised by adding after "MMDS"," or MDS H-channel".

20. Section 21.902(i)(6)(A) is revised by adding before "ITFS"," cochannel or adjacent channel", and by adding after "MMDS"," or MDS H-channel".

21. Section 21.902(i)(6)(C)(i) through (vi) are revised by adding after "MMDS"," or MDS H-channel".

22. Section 21.902(i)(6)(D) is revised by adding after "MMDS"," or MDS Hchannel".

23. Section 21.905(c) is amended by replacing the first reference to "2596-2644" with "2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz" and by replacing the second reference to "2596-2566" with "2596-2544 MHz, 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz".

24. Section 21.908(b) is revised by replacing "2150-2162 MHz and 2596-2644 MHz" with "2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, and 26742680 MHz".

25. Paragraph (c) is added to Section 21.909 to read as follows:

§ 21.909 MDS response stations.

* * * * *

(c) The response channels associated with channels E3, E4, F3, F4, H1, H2, and H3 are allocated to the private operational-fixed service (Part 94).

26. Section 21.912 is amended by replacing "2596-2644" with "2596-2680" in paragraphs (a) and (c), and by removing in paragraph (c) the word "proposed", and by adding paragraphs (d), (e), (f) and (g) to read as follows:

§ 21.912 Cable television company eligibility requirements.

* * * * *

(d)(1) A cable television company shall be exempt from the provisions of paragraphs (a) through (c) of this section if the protected service area, as defined at Section 21.902(d) of this Part, contains none of the following:

Any incorporated place of 2,500 inhabitants or more, or any part thereof;

Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or

Any other territory, incorporated or unincorporated, included in an urbanized area.

(2) All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U. S. Department of Commerce, Bureau of the Census. In no event shall any statistics resulting from censuses prior to 1980 be used. The Census Bureau has defined some incorporated places of 2,500 inhabitants or more as "extended cities." Such cities consist of an urban part and a rural part.

(3) If the proposed protected service area includes a rural part of an extended city, but includes no other territory described in this paragraph, an exemption shall apply. If there is an MDS applicant, conditional licensee, or licensee in the area for at least four MDS channels, this rural exemption to Section 21.912 does not apply.

(e) The provisions of paragraphs (a) through (c) of this section will not apply to one MDS or MMDS channel used to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator will be permitted one MDS channel in an MMDS protected service area for this purpose, and no more than one MDS channel in an MMDS protected service area may be used by a cable television company or its affiliate or lessor pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Common Carrier Bureau a cover letter explicitly identifying itself or its lessee as a local cable operator and stating that the lease was executed to facilitate the provision of local programming. The first application or the first lease notification in an area filed with the Commission will be entitled to the exemption. The limitations on one MDS channel per party and per area include any cable/MDS operations grandfathered pursuant to paragraph (f) of this Section or cable/ITFS operations grandfathered pursuant to Section 74.931(e) of this Chapter.[1] The cable operator must demonstrate in its MDS/MMDS application that the proposed local programming will be provided within one year from the date its application is granted. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel, whichever is later. If an MDS license for these purposes is granted and the programming is subsequently discontinued, the license will be automatically forfeited the day after local programming service is discontinued.

(f) Applications filed by cable television companies, or affiliates, for MDS channels prior to February 8, 1990, will not be subject to the prohibitions of this Section. Applications filed on February 8, 1990, or thereafter will be returned. Lease arrangements between cable and MDS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will also not be subject to the prohibitions of this Section. Leases between cable television companies, or affiliates, and MDS/MMDS station licensees, conditional licensees, or applicants executed on February 8, 1990, or thereafter, are invalid.

(g) Interested persons may file a petition to deny an application filed pursuant to paragraphs (d) or (e) of this section within 30 days after the Commission gives public notice that the application or petition has been filed. Petitions must be served upon the applicant, and must contain a complete and detailed showing, supported by affidavit, of any facts or considerations relied upon. The applicant may file an opposition to the petition to deny within 30 days after the filing of the petition, and must serve copies upon all persons who have filed petitions to deny. The Commission, after consideration of the pleadings, will determine whether the public interest, convenience and necessity would be served by the grant or denial of the application, in whole or in part. The Commission may specify other procedures, such as oral argument, evidentiary hearing or further written submission directed to particular aspects, as it deems appropriate.

Notes:

[1] In these grandfathered situations, we will consider granting waivers to permit the use of a second MDS channel for the delivery of locally produced programming. Because allocating a second channel to this use would further reduce the channel capacity available for wireless cable service, we will require an applicant for the second channel to demonstrate, at a minimum, that it is ready and able to provide additional locally produced programming to area cable systems, and that no other practical means of delivering the programming are available to it. In considering requests for waiver, we will also take into account the competitive environment for the production and delivery of locally produced programming in the relevant markets.

27. Section 21.914 is revised by replacing "2150-2162 MHz or 2596-2644 MHz" with "2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz".

28. The Authority Citation for Part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303.

29. Section 74.902 is amended by revising paragraph (h) and adding paragraphs (i) and (j), to read as follows:

§ 74.902 Frequency assignments.

* * * * *

(h) On the E and F-channel frequencies, a point-to-point ITFS station may be involuntarily displaced by an MDS applicant, conditional licensee or licensee, provided that suitable alternative spectrum is available and that the MDS entity bears the expenses of the migration. Suitability of spectrum will be determined on a case-by-case basis: at a minimum, the alternative spectrum must be licensable by ITFS operators on a primary basis (although it need not be specifically allocated to the ITFS service), and must provide a signal that is equivalent to the prior signal in picture quality and reliability, unless the ITFS licensee will accept an inferior signal. Potential expansion of the ITFS licensee may be considered in determining whether alternative available spectrum is suitable.

(i) If suitable alternative spectrum is located pursuant to paragraph (h) of this section, the initiating party must prepare and file the appropriate application for the new spectrum, and must simultaneously serve a copy of the application on the ITFS licensee to be moved. The initiating party will be responsible for all costs connected with the migration, including purchasing, testing and installing new equipment, labor costs, reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the migration application, and other reasonable documented costs. The initiating party must secure a bond or establish an escrow account to cover reasonable incremental increase in ongoing expenses that may fall upon the migrated licensee. The bond or escrow account should also account for the possibility that the initiating party subsequently becomes bankrupt. If it becomes necessary for the Commission to assess the sufficiency of a bond or escrow amount, it will take into account such factors as projected incremental increase in electricity or maintenance expenses, or relocation expenses, as relevant in each case.

(j) The ITFS party to be moved will have a 60-day period in which to oppose the involuntary migration. The ITFS party should state its opposition to the migration with specificity, including engineering and other challenges, and a comparison of the present site and the proposed new site. If involuntary migration is granted, the new facilities must be operational before the initiating party will be permitted to begin its new or modified operations. The migration must not disrupt the ITFS licensee's provision of service, and the ITFS licensee has the right to inspect the construction or installation work.

Section 74.931 is amended by revising paragraph (a) and adding paragraphs (h), (i) and (j) to read as follows:

§ 74.931 Purpose and permissible service.

(a) Instructional television fixed stations are intended primarily to provide a formal educational and cultural development in aural and visual form, to students enrolled in accredited public and private schools, colleges and universities. Authorized instructional television fixed station channels must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools, with limited exceptions as set forth in Sections 74.990 through 74.992 of this Part.

* * * * *

(h) Except as specified in paragraph (i), below, no licensee of a station in this service may lease transmission time or capacity to any cable television company either directly or indirectly through an affiliate owned, operated, controlled by, or under common control with the cable television company, if the ITFS main transmitter station is within 20 miles of the cable television company's franchise area or service area.

(i) The provisions of paragraph (h) of this section will not apply to ITFS excess capacity leased directly or indirectly to cable operators or affiliates to provide locally-produced programming to cable headends. Locally-produced programming is programming produced in or near the cable operator's franchise area and not broadcast on a television station available within that franchise area. A cable operator or affiliate will be permitted to lease ITFS excess capacity equivalent to one MDS channel within 20 miles of the cable television franchise area or service area for this purpose, and, within 20 miles of the cable television franchise area or service area, no more ITFS excess capacity than the equivalent of one MDS channel may be used by a cable television company or affiliate pursuant to this paragraph. The licensee for a cable operator providing local programming pursuant to a lease must include in a notice filed with the Mass Media Bureau a cover letter explicitly identifying its lessee as a local cable operator or affiliate and stating that the lease was executed to facilitate the provision of local programming. The first lease notification for an

MDS or ITFS channel in an area filed with the Commission will be entitled to the exemption. The limitations on the equivalent of one MDS channel per party and per area include any cable/ITFS operations grandfathered pursuant to paragraph (11) of this Section or any cable/MDS operations grandfathered pursuant to Section 21.912(f) of this Chapter. Local programming service pursuant to a lease must be provided within one year of the date of the lease or one year of grant of the licensee's application for the leased channel(s), whichever is later.

(j) Lease arrangements between cable and ITFS entities for which a lease or a firm agreement was signed prior to February 8, 1990, will not be subject to the prohibitions of paragraph (8) of this Section. Leases between cable television entities and ITFS entities executed on February 8, 1990, or thereafter, are invalid.

31. Section 74.932 is amended by revising paragraph (a) introductory text and paragraph (b) to read as follows:

§ 74.932 Eligibility and licensing requirements.

(a) With certain limited exceptions set forth in Sections 74.990 through 74.992 of this Part, a license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

(1)* * *

(2)* * *

(3)* * *

(4)* * *

(b) No numerical limit is placed on the number of stations which may be licensed to a single licensee. However, individual licensees will be governed by the limitations of Sections 74.902 and 74.990(d) of this Part as to the number of channels which may be used. A single license may be issued for more than one transmitter if they are to be located at a common site and operated by the same licensee. Applicants are expected to accomplish the proposed operation by the use of the smallest number of channels required to provide the needed service.

* * * * *

32. Section 74.986 is added to read as follows:

§ 74.986 Involuntary ITFS station modifications.

(a) Parties specified in paragraph (b) of this section may, subject to Commission approval, involuntary modify the facilities of an existing ITFS licensee in the following situations:

(1) If the initiating party is prevented from invoking the 0 dB interference protection standard (see Section 21.902(f)(2) of this Chapter and Section 74.903(a)(2) of this Part) for projecting its impact on an existing ITFS licensee because of that licensee's pre-May 26, 1983, facilities, the applicant, permittee or licensee may modify the facilities of the pre-existing ITFS station with equipment adequate to perform at that level of interference;

(2) If the initiating party is prevented from operating at a higher transmitter output power or EIRP because such power level will cause harmful interference to an ITFS station and modifying the ITFS station will avoid such harmful interference;

(3) If the initiating party is prevented from installing a signal booster because such installation will cause harmful interference to an ITFS station and modifying the ITFS station will avoid harmful interference;

(4) If an ITFS licensee uses equipment incapable of meeting the aural power standard specified in Section 74.935(d) and that equipment becomes a source of harmful adjacent-channel interference, and other equipment would avoid such harmful interference;

(5) If an ITFS licensee uses equipment incapable of meeting the transmitter tolerance standard specified in Section 74.961 of this Part and that equipment becomes a source of harmful co-channel interference, and other equipment would avoid the harmful interference;

(6) If an ITFS licensee uses equipment incapable of meeting the out-of-band emissions standard specified in Section 74.936 of this Part and that equipment becomes a source of harmful adjacent-channel interference, and other equipment would avoid the harmful interference; and

(7) If harmful adiacent-channel interference may be avoided by colocation of an ITFS facility with its own facilities.

(b) Involuntary modification may be sought by an MDS, MMDS or ITFS licensee, conditional licensee, permittee or applicant. Opposed applicants do not have authority to seek involuntary colocation. An opposed application is one that faces a competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for competing applications and petitions to deny has passed. If an initiating application is opposed, the companion ITFS modification application will be returned. It may be refiled when the initial application is again unopposed.

(c) The application for involuntary modification must be prepared, signed and filed by the initiating party. The applicant must submit FCC Form 330 but need not fill out Section II (Legal Qualifications), and the application must include a cover letter clearly indicating that the modification is involuntary and identifying the parties involved. A copy of the application must be served on the affected ITFS party on or before the day of filing. The ITFS party to be modified will have a 60-day period in which to oppose the modification application; the opposition should state objections to the modification with specificity, including engineering and

other challenges. If the modification includes colocation, the opponent should address the desirability of the present site compared to the proposed new site.

(d) The party initiating the modification will be responsible for all costs connected with the modification, including purchasing, testing and installing new equipment, labor costs, reconfiguration of existing equipment, administrative costs, legal and engineering expenses necessary to prepare and file the modification application, and other reasonable documented costs. The initiating party must secure a bond or establish an escrow account to cover reasonable incremental increase in ongoing expenses that will fall upon the modified ITFS entity and to cover expenses that would inure to the modified ITFS entity in the event the initiating party becomes bankrupt. In establishing a bond or escrow amount, such factors as projected electricity or maintenance expenses, or relocation expenses must be taken into account, as relevant in each case.

(e) The involuntarily modified facilities must be operational before the initiating party will be permitted to begin its new or modified operations. The modification must not disrupt the ITFS licensee's provision of service, and the ITFS licensee has the right to inspect the construction or installation work.

Section 74.990 is added to read as follows:

§ 74.990 Use of available instructional television fixed service frequencies by wireless cable entities.

(a) Notwithstanding the provisions of Sections 74.931 and 74.932 of this Part, a wireless cable entity may be licensed on instructional television fixed service frequencies in areas where at least eight other instructional television fixed service channels remain available in the community for future ITFS use. Channels will be considered available for future ITFS use if there are no cochannel operators or applicants within 50 miles of the transmitter site of the proposed wireless cable operation, and if the transmitter site remains available for use at reasonable terms by new ITFS applicants on those channels within three years of commencing operation.

(b) No more than eight instructional television fixed service channels per community may be licensed to wireless cable entities.

(c) To be licensed on instructional television fixed service channels, a wireless cable applicant must hold a conditional license, license or a lease, or must have filed an unopposed application for at least four MDS channels to be used in conjunction with the facilities proposed on the ITFS frequencies. An unopposed application is one that faces no competing application(s) or petition(s) to deny. Applicants will be required to confirm their unopposed status after the period for filing competing applications and petitions to deny has passed. If an MDS or MMDS application is opposed, the companion ITFS application will be returned.

(d) To be licensed on instructional television fixed service channels, a wireless cable applicant must show that there are no multipoint distribution service or multichannel multipoint distribution service channels available for application, purchase or lease that could be used in lieu of the instructional television fixed service frequencies applied for. A wireless cable entity may apply for instructional television fixed service frequencies at the same time it applies for the related MDS or MMDS frequencies, but if that MDS or MMDS application is opposed by a timely filed mutually exclusive application or petition to deny, the application for ITFS facilities will be returned.

(e) If an instructional television fixed service application and a wireless cable application for available instructional television fixed service facilities are mutually exclusive, as defined at Section 21.31(a) of this Chapter, the instructional television fixed service application will be granted if the applicant is qualified. An instructional television fixed service applicant may not file an application mutually exclusive with a wireless cable application if there are other instructional television fixed service channels available for the proposed instructional television fixed service facility.

(f) The interference protection provided wireless cable applicants and licensees of instructional television fixed service facilities will be that described in Section 21.902 of this Chapter.

34. Section 74.991 is added to read as follows:

§ 74.991 Wireless cable application procedures.

(a) A wireless cable applicant for available instructional television fixed service channels must file Sections I and V of FCC Form 330, with a complete FCC Form 494 appended. A wireless cable applicant must include with its application a cover letter clearly indicating that the application is for a wireless cable entity to operate on ITFS channels. A wireless cable application for available instructional television fixed service channels will be subject to Section 21.914 of this Chapter with respect to other wireless cable applicants and a 60-day cutoff period with respect to instructional television fixed service applicants. All cut-off lists for ITFS frequencies, regardless of the nature of the applicant, will be published as ITFS public notices.

(b) Within 30 days of filing its application, a wireless cable applicant for available instructional television fixed service channels must give local public notice of the filing of its application in a newspaper. The local public notice must be made in a daily newspaper of general circulation published in the community in which the proposed station will be located at least twice a week for two consecutive weeks in a three week period. If there is no such daily newspaper, notice must be made in a weekly newspaper of general circulation published in the community once a week for three consecutive weeks in a four week period. If there is no daily or weekly newspaper published in the community, notice must be made in the daily newspaper, wherever

published, that has the greatest general circulation in the community twice a week for two consecutive weeks within a three week period.

(c) The public notice required by paragraph (b) of this section shall contain, where applicable, the following information:

(1) The name of the applicant if the applicant is an individual, the names of all partners if the applicant is a partnership, or the names of all officers and directors and of those persons holding 10 percent or more of the capital stock or other ownership interest if the applicant is a corporation or an unincorporated association;

(2) The purpose for which the application will be filed (*i.e.*, for a construction permit for a wireless cable system);

(3) A statement that the channels applied for are ITFS channels normally reserved for educational use, and a list of the specific frequencies or channels on which the proposed station will operate;

(4) The date the application was tendered for filing with the FCC;

(5) The facilities sought, including type and class of station, power, location of studios, transmitter site and antenna height; and

(6) A statement that a copy of the application and related material are on file for public inspection at a stated address in the community in which the station is located or is proposed to be located.

35. Section 74.992 is added to read as follows:

§ 74.992 Access to channels licensed to wireless cable entities.

(a) An educational institution or entity that would be eligible for ITFS channels that are licensed to a wireless cable entity may be entitled to access to those channels. Requests for access may be made by application to the Commission on FCC Form 330 with a copy simultaneously served on the wireless cable licensee. An applicant for access must fill out Sections I, II, III and IV of the ITFS application Form 330. Section I, question 1 should be answered by spelling out, "For access to existing facilities." Section I, question 2b should include the name of the wireless cable licensee or applicant. A cover letter must clearly indicate that the application is for ITFS access to a wireless cable entity's facilities on ITFS channels.

(b) An ITFS entity determined by the Commission to have right of access to wireless cable licensed facilities may have access to a maximum of 40 hours per channel per week. The ITFS entity has the right to designate 20 of those hours as follows:

(1) 3 hours of the ITFS entity's choice each day, Monday through Friday, between 8:00 a.m. and 10:00 p.m., excluding weekends, holidays and school vacations; and

(2) The remaining five hours any time of the ITFS entity's choice between 8:00 a.m. and 10:00 p.m., Monday through Saturday.

(c) No time-of-day and day-of-week obligations will be imposed on either party with respect to the other 20 hours of access time.

(d) The ITFS user must provide the wireless cable licensee with its planned schedule of use four months in advance. No minimum amount of programming will be required of an ITFS operator seeking access to one channel; for access to a second channel, the ITFS user must use at least 20 hours per week on the first channel from 8:00 a.m. to 10:00 p.m., Monday through Saturday; for access to a third channel, the ITFS entity must use at least 20 hours per week on the first channel and on the second channel during the hours prescribed above, and so on. Only one educational institution or entity per wireless cable licensed channel will be entitled to access from the wireless cable entity. Access will not be granted to a single entity for more than four channels, unless it can satisfy the waiver provisions of Section 74.902(d) of this Part.

(e) When an ITFS entity is granted access to an ITFS channel of a wireless cable licensee, the wireless cable licensee will be required to pay half of the cost of five standard receive sites on that channel. The wireless cable entity may, at its option, pay the costs of an application and facility construction for such ITFS entity on other available ITFS channels, including half of the cost of five receive sites per channel.

(f) An instructional television fixed service entity granted access to instructional television fixed service channels licensed to a wireless cable entity will have the interference protection afforded ITFS licensees (see Section 74.903 of this Part).

(g) After three years of operation, a wireless cable entity licensed to use ITFS channels will not be required to grant new or additional access to such ITFS channels, or provide any alternative facilities to any ITFS entity seeking access to its facilities, if there are suitable ITFS frequencies available for the ITFS entity to build its own system.

(h) The parties may mutually agree to modify any requirements or obligations imposed by these provisions, except for the requirement that an educational entity use at least 20 hours per week on a channel of a wireless cable licensee before requesting access to an additional channel.

36. The Authority Citation for Part 94 continues to read as follows:

AUTHORITY: Secs. 4,303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154,303, unless otherwise noted.

37. The table in Section 94.61 is revised by removing the entry "2500 to 2690" and adding the entry "2650 to 2690," removing note 22, and revising note 5, to read as follows:

§ 94.61 Applicability.

* * * * *

2650 to 2690. ..... [5]

* * * * *

[5] Frequencies in this band are shared with earth stations in the Fixed Satellite Service (Part 25), space stations in the Broadcasting Satellite Service (Part 25), and with stations in the Instructional Television Fixed Service (ITFS) (Part 74). No new licenses will be issued in the bands 2650-2656, 2662-2668 or 2674-2680 MHz. Existing stations in the 2650-2656 MHz, 2662-2668 MHz and 2674-2680 MHz frequency bands will be grandfathered and licensed under Part 21 of this Chapter.

* * * * *

38. (Paragraph (a) of Section 94.63 is revised to read as follows:

§ 94.63 Interference protection criteria for operational fixed stations.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform a frequency engineering analysis to assure that the proposed facilities will not cause interference to existing or previously appliedfor stations in this service of a magnitude greater than that specified in the criteria set forth in paragraph (b) of this section, unless otherwise agreed to in accordance with § 94.15(b). As an exception to the above requirement, when the proposed facilities are to be operated in the bands 932-935 MHz, 941-944 MHz, 10,550-10,680 MHz, 17,700-19,700 MHz, 21,200-21,800 MHz, 22,400-23,000 MHz, or 38,600-40,000 MHz, applicants must follow the prior coordination procedure specified in § 21.100(d) of this chapter. In addition, when the proposed facilities are to be operated in the bands 12,500-12,700 MHz, applications must also follow the procedures in § 21.706(c) and (d) of this Chapter and the technical standards and requirements of Part 25 of this Chapter as regards licensees in the Communication-Satellite Service. See also § 94.77.

39. Section 94.65 is amended by revising paragraph (f) to read as follows:

§ 94.65 Frequencies.

* * * * *

(f) *2500-2690 MHz:* Operational-fixed stations may be authorized on the following frequencies:

FREQUENCIES (MHz)

2686.9375
2687.9375
2688.5625
2688.6875
2688.9375
2689.5625
2689.6875

Operational-Fixed stations authorized in this band as of July 16, 1971, which do not comply with the provisions of this part may continue to operate on the frequencies assigned on a coequal basis with other stations operating in accordance with the Table of Frequency allocations. Requests for subsequent license renewals or modifications for such stations will be considered. However, expansion of systems comprised of such stations will not be permitted, except pursuant to the provisions of this Part. No new licenses will be issued under this Part until specific operating parameters are established for this band.

* * * * *

40. The table in Section 94.67 is revised by removing the entry "2,500 to 2,690," removing note 2, and redesignating notes 3, 4, 5, 6, 7, 8 and 9 as notes 2, 3, 4, 5, 6, 7 and 8.

41. The table in Section 94.71 is revised by removing the entries "2650-2680 MHz" and "2686.9375-2688.9375," removing note 3 and redesignating notes 4, 5, 6 and 7 as notes 3, 4, 5 and 6.

42. The table in Section 94.73 is revised by removing the entries "2500 to 2686" and "2686 to 2690" and revising note 4 to read as follows:

§ 94.73 Power limitations.

* * * * *

[4] Except in the bands 12,500-12,700 MHz, the maximum allowable EIRP is specified in § 94.77.

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43. The table in Section 94.75 is revised by removing the entry "1850 to 2690" and adding the entry "1850 to 2500," and by revising note 2 to read as follows:

§ 94.75 Antenna limitations.

* * * * *

[2] Except for 2,150-2,160 MHz, where the maximum beamwidth is 360 degrees.

* * * * *

44. The table in Section 94.92 is revised by removing the entries "25502656," "2662-2668," "2674-2680," "2686.9375," "2687.9375" and "2688.9375," removing notes 6 and 9, and redesignating notes 7 and 8 as notes 6 and 7.

45. Section 94.95 is removed and reserved.

APPENDIX D
H-Channel Transition

1. *Forms.* Because converted H-channel stations will be subject to the MDS rules, it will not be necessary to promulgate new forms as suggested by some commenters. *See* 47 C.F.R. Secs. 21.3, 21.5, 21.6, 21.7, 21.11 and 21.13.

2. *Part 21 Applicability* . As of January 2, 1992, the Part 21 rules will apply to all H-channel applications and authorizations. Prior to January 2, 1992, any applicants or licensees for H-channel stations who wish to be considered under Part 21 rules must submit a waiver request to the Domestic Radio Branch, Common Carrier Bureau,

FCC, Room 6310, 1919 M Street, N.W., Washington, D.C. 20554. *See* 47 C.F.R. Sec. 21.19; *see also Multipoint Distribution Service*, 29 Rad. Reg. 2d 382 (1974). After January 1, 1992, a licensed H-channel station that has met its construction completion requirement may continue to operate according to the terms of its authorization, but must operate under Part 21 regulation.

3. *Part 94 Applicability.* Unless a waiver is granted pursuant to paragraph 2 herein, the Part 94 rules will apply to all H-channel applications and authorizations until January 2, 1992. Any applicant or licensee of an H-channel station who wishes the Part 94 rules to apply, in lieu of the Part 21 rules, after January 1, 1992, must submit, on or before January 2, 1992, a waiver request to the Microwave Branch, Private Radio Bureau, FCC, Gettysburg, PA 17326. See paragraph 8 herein for a discussion of non-common carrier status. Any request for waiver must be properly filed, and accompanied by the appropriate fee, and be properly signed by the licensee or applicant. Attorneys may not sign waiver requests on behalf of a client, except as permitted by 47 C.F.R. Sec. 94.29.

4. *Processing of Pending Initial Applications.* Initial H-channel applications for a new station filed prior to September 27, 1991, for which final action has not been taken, will continue to be processed pursuant to Part 94 rules. A freeze is in effect for filing applications between September 26, 1991 and January 2, 1992. On January 2, 1992, initial applications for a new H-channel station may be filed on FCC Form 494 pursuant to Part 21 rules. *See* 47 C.F.R. Secs. 21.4, 21.5(b), and 21.900; *see also* 47 C.F.R. Sec. 1.743. If a license for a H-channel station has been issued prior to January 2, 1992, with a construction completion deadline date on January 2, 1992, or thereafter, there must be compliance with appropriate Part 21 rules, including the requirement to file a timely certification of completion of construction on FCC Form 494A, together with the appropriate filing fee. *See also Part 21 Revision*, 2 FCC Rcd 5713 (1987); *Part 21 Rules*, 60 FCC 2d 549 (1976); *Domestic Public Radio Services*, 55 FCC 2d 744 (1975).

5. *Processing of Modification Applications.* Pending modification applications for H-channel stations, for which final action has not been taken, will continue to be processed pursuant to Part 94 rules. Any applicant who wishes its modification application of an H-channel station to be considered under Section 21.41 or 21.42 must resubmit the modification application, with appropriate showings, as a new modification application on January 2, 1992, or thereafter. On January 2, 1992, or thereafter, modification applications for an H-channel station must be filed on FCC Form 494 and filed pursuant to Part 21 rules.

6. *Amendments.* An application, initial or modification, pending in the Private Radio Bureau may be amended in accordance with applicable Part 94 rules. Applicants are advised, however, that a major amendment (*see* 47 C.F.R. Sec. 94.45) makes an application untimely filed with respect to the September 26, 1991 freeze, and will result in dismissal of the application. This includes any change in the station location.

7. *Requests for Extension.* Requests for extension of time to construct an H-channel station filed prior to January 2, 1992, must be submitted to the Private Radio Bureau and will be considered pursuant to the Part 94 rules. Applications for extension of time to construct an H-channel station filed on January 2, 1992, or thereafter, must be submitted to the Common Carrier Bureau, on FCC Form 701, with the appropriate filing fee, pursuant to the Part 21 rules. *See* 47 C.F.R. Secs. 1.105, 21.11(b) & 21.40; *see also Part 21 Revision*, 2 FCC Rcd 5713, 5717-18, 5721-22 (1987); *Notice of Proposed Rulemaking, id.*, 104 FCC 2d 116,120,122-26 (1986).

8. *Renewals.* In 1983, a ten-year term was adopted for Part 21 licenses. Therefore, all MDS/MMDS licenses expired May 1, 1991. The next expiration date for all MDS/MMDS licenses is May 1, 2001. H-channel station licenses do not have a similar common expiration date. For any H-channel station license, with a license term expiring after September 26, 1991 and before January 2, 1992, its renewal application must be submitted as prescribed by the Part 94 rules. After January 1, 1992, the licensee of a licensed H-channel station that has met its construction requirement must file a renewal application, on FCC Form 405, 30 to 60 days prior to the expiration date stipulated on the license pursuant to 47 C.F.R. Secs. 21.44 and 21.45. *See* 47 C.F.R. Sec. 1.62. Any H-channel renewal application granted after January 2, 1992, will be given a license expiration date of May 1, 2001. Eventually, all H-channel licenses will expire on the same day as MDS/MMDS station licenses expire.

9. *ITFS Protection.* Although an H-channel station will become a single-channel, not a multichannel, MDS station, each applicant who files an application for an H-channel station on January 2, 1992, or thereafter, must comply with the requirements of 47 C.F.R. Sec. 21.902(i).

10. *Status Election.* MDS/MMDS applicants, conditional licensees, and licensees may elect either common carrier or non-common carrier status. *MDS Status Election Order*, 2 FCC Rcd 4251 (1987). As of January 2, 1992, current H-channel applicants and licensees are deemed non-common carriers. Non-common carrier status should assure licensees that service as currently provided by an OFS licensee may continue. Therefore, most H-channel licensees will be assured that a request for continued application of Part 94 rules is unnecessary. *See* paragraph 3 herein. Pursuant to 47 C.F.R. Secs. 21.23 and 21.40, H-channel applicants and licensees may elect common carrier status. If there is a subsequent election of non-common carrier status, Section 21.910 is applicable. We note that item 17(d) of FCC Form 494 asks an MDS applicant if it elects common carrier or non-common carrier status.

11. *Filing Fees.* Each H-channel application or form filed on January 2, 1992, or thereafter, must be submitted in the manner and with the filing fee stipulated at 47 C.F.R. Sec. 1.1105.

12. *Mutually-Exclusive Applications.* For H-channel applications filed on January 2, 1992, or thereafter, mutual-exclusivity determinations will be made pursuant to 47 C.F.R. Secs. 21.31 and 21.914.

13. *Annual Reports.* Section 21.911 with regard to annual reports will apply to H-channel stations as of January 2, 1992. However, H-channel stations are not required to file annual reports until March 1, 1993, for the calendar year 1992.

14. *H-channel Lotteries.* Lotteries held for H-channel applications filed January 2, 1992, or thereafter, will comply with the provisions of 47 C.F.R. Secs. 1.824, 1.1621-1.1623, and 21.33(a).

15. *Summary.* Applying the discussion in this appendix, we provide the following two examples of possible scenarios for H-channel stations after the January 2, 1992 transition to the Multipoint Distribution Service.

Example One: A Part 94 licensee who has completed H-channel station construction, or is scheduled to complete construction, or should have completed station construction before January 2, 1992, must file a waiver request if the licensee wants continued applicability of the Part 94 rules, on or before January 2, 1992, or the Part 21 rules will apply. If the waiver request is not granted, the next required filing would be a renewal application, unless a modification application or an extension application is filed.

Example Two: A Part 94 licensee who has *not* completed station construction before January 2, 1992, if the construction completion date specified on the H-channel authorization is January 2, 1992, or thereafter, must file in a timely manner, either: (a) pursuant to Part 94 rules, a waiver request for continued applicability of the Part 94 rules, if the licensee wants continued applicability of the Part 94 rules; or (b) pursuant to Part 21 rules, an extension application, with the appropriate filing fee; or (c) pursuant to Part 21 rules, a certification of completion of construction, with the appropriate filing fee.

Separate Statement of Commissioner James H. Quello

RE: Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service (GEN Docket Nos. 90-54 and 80-113).

The survival and growth of the Instructional Television Fixed Service (ITFS) is necessary to accommodate the educational needs of our society. The education of Americans is no longer confined to the classroom. ITFS programming is available to a variety of locations within an ITFS licensed community and at odd hours of the day seven days a week. Certainly, ITFS programming continues to contribute to the traditional classroom learning environment.

Today, Americans identify education as one of the most significant issues facing our country. In a limited, but very important way, the Federal Communications Commission continues to play an important role in assuring that opportunities exist for those willing to make the investment in the Instructional Television Fixed Service.

Critics argue that ITFS is not fully utilizing its spectrum allotment resulting in valuable spectrum remaining fallow. In todays market, there are significant demands for this spectrum; however, the value of education cannot be underestimated.

We must review carefully proposed alternative uses of ITFS spectrum. One only has to look at the evolution of non-commercial educational broadcasting as an example. The forethought of the Commission to set aside broadcast frequencies for non-commercial educational use assured that educational broadcasting would have a spectrum home even in today's market where there are many competing demands for broadcast spectrum. Third Notice of Further Proposed Rulemaking of Television Assignments, 16 FR 3072, 3079 (March 22, 1951). Educational broadcasting developed more slowly than its commercial counterparts due in part to the differing funding mechanisms. A parallel can be drawn between the development of non-commercial educational broadcasting and the development of ITFS services. The slow growth of ITFS should not be an indicator of lack of interest on the part of educators. Often, the growth of ITFS, like its educational broadcast counterparts, suffers from the lack of consistent and secure funding.

Today, we have competing demands for ITFS spectrum particularly by the multipoint distribution service (MDS). To facilitate the growth of ITFS and to provide the possibility of additional channels for MDS operators, the Commission allowed ITFS licensees to lease excess channel capacity to MDS licensees. 47 C.F.R. Section 74.931 (e) and Second Report and Order in MM Docket No. 83-523, 101 FCC 2d 50, 87,90-91 (1985). This leasing arrangement provides revenues to ITFS licensees and facilitates the further development of ITFS services. MDS operators also benefit from these leasing arrangements by providing customers more channel selection. Consumers benefit by having access to ITFS programming and in cabled markets, where there is an MDS operation, they now have a competitive multichannel video provider. I supported then, as I do now, the opportunity for ITFS licensees to lease excess channel capacity. I believe our rules provide a delicate balance between the needs of ITFS licensees and MDS operators.

Generally, I support today's actions. I seek to assure the carefully crafted balance between ITFS and MDS needs remains intact. I support the repeal of the time requirements ITFS licensees had to program ITFS material in order to qualify for the 20 hour per-channel per-week requirement. This rule was important initially to assure that legitimate ITFS applicants were providing educational/instructional services at times when students were most likely to be in the audience. Now that many ITFS licensees are operating and providing important instructional services, I believe that licensees should have the flexibility to determine when to air ITFS programming. I recognize the tremendous commitment to education made by ITFS licensees, nevertheless, I would like to caution ITFS operators against programming the majority of their ITFS services when students are least likely to be in the audience. Additionally, an ITFS licensee using valuable spectrum solely for down loading programming for videotaping thereby allowing for more convenient viewing would, in my opinion, be failing as an ITFS licensee.

I concur with today's action allowing for involuntary station modifications. Generally, I have serious concerns about involuntary station modifications, however, in this proceeding I believe we are providing sufficient safeguards. The more appropriate approach to resolving technical conflicts is to have ITFS and MDS licensees resolve their differences. Unfortunately, I recognize there will be times when agreement cannot be reached and the Commission may become involved. Nonetheless, if involuntary modifications are made, then such modifications should benefit the ITFS licensee. I am troubled by the very nature of involuntary modifications. To allow licensees in one service to seek FCC authority to modify the facilities of licensees in another service without the consent of the licensee

whose facility is being modified is unique. Although the Commission must approve the modification request, this approach runs counter to our well established rules and policies regarding licensee control over their facilities, and, I am concerned that the Commission is breaking new ground.

I accept that portion of today's action that provides a 15 mile protection contour for ITFS licensees' non-ITFS programming to the extent such protection does not preclude new ITFS entrants. I recognize the benefit this protection provides to MDS operators whose service receives a 15 mile protected contour and who may be leasing excess ITFS channel capacity. Changing the rules to allow such protection for non-ITFS programming on ITFS facilities has the potential of precluding new ITFS entrants. I am reminded that this is spectrum allocated to the ITFS service and our actions should not thwart the development of new ITFS systems.

Finally, there is the issue of allowing MDS operators to be licensed on ITFS spectrum. I do not mind MDS access to ITFS channels when there is at least 8 available ITFS channels in a community. My concern focuses on the rights ITFS applicants or licensees have to recapture ITFS channels licensed to MDS operators when previously available ITFS channels are licensed and are no longer available. Will ITFS applicants have the right to apply for the ITFS channels used by MDS operators? I believe they should have a this right. To prohibit new ITFS applicants from accessing ITFS channels licensed to MDS operators results in reallocation of ITFS spectrum. The net result of today's action is to reduce the amount of spectrum available to ITFS entities. Additionally, today's action authorizes MDS entities in the ITFS service on a shared basis and I am concerned that this is just the beginning of a long series of battles to capture ITFS spectrum away from its intended educational use. Therefore, I dissent to this portion of the item. I recognize the problem this presents to MDS operators as well as potential ITFS applicants. One possible approach would be to allow MDS operations on ITFS frequencies on a secondary basis and to provide a reasonable transition period from MDS operations to ITFS upon the Commission awarding an ITFS license to a qualified applicant. The majority's position recognizes the needs of potential ITFS licensees, however, I am concerned the long-term effect of providing co-primary status to MDS operators on ITFS spectrum will diminish the ITFS service. Such action, in my opinion, disrupts the delicate balance previously crafted to meet the needs of both ITFS and MDS licensees.

SEPARATE STATEMENT OF
COMMISSIONER ANDREW C. BARRETT

In re: Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands (GEN Docket No. 90-54)

I am a strong supporter of distance education programs, whether transmitted by radio signals or over the wire. In today's society, I am fully aware of the budgetary challenges facing educators in both rural and urban locations. At the same time, I also am concerned that we continue to grant flexibility for innovative uses of the spectrum. Given the increasing number of new services that demand access to some portion of the spectrum, I am sensitive to our mandate to ensure that the spectrum is used efficiently. Thus, in this particular action, I balanced our desire to grant some flexibility for wireless cable operators to configure competitive, multichannel systems against my concern that Instructional Television Fixed Service [ITFS] licensees or license applicants, with legitimate program needs, continue to have access to ITFS frequencies. I believe this item strikes an appropriate balance.

The edits made to this item, and an associated ITFS technical item in this September agenda meeting[1], satisfy my concerns for ensuring ITFS operators continue to have sufficient operational flexibility. In particular, the rules are designed to ensure that a wireless cable operator is on notice of its obligation to: 1) negotiate terms and conditions with existing ITFS operators for access to leased channel capacity; and 2) accommodate new ITFS operators who establish a legitimate need for access to ITFS channels used by that operator. The conditional access to and use of vacant ITFS channels by wireless cable operators is important to maintaining the proper balance of interests in this scheme.

I will monitor closely Commission efforts to enforce these rules. While I support additional flexibility for wireless cable operators on some of the unused ITFS frequencies, I do not seek to unfairly shift the balance against ITFS operators who have legitimate uses for these channels. I believe the safeguards and recapture provisions adopted in this item can ensure an appropriate balance between these two services. However, I am mindful that the Commission must ensure that the

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[1] See also Order on Reconsideration in GEN Docket Nos. 90-54 and 80-113, adopted on September 26, 1991.

access granted to wireless cable operators on ITFS frequencies is fully enforced in accordance with the conditions imposed in this Order. Where this does not occur, I encourage ITFS licensees to make the Commission fully aware of their concerns.

*U.S. Government Printing Office: 1991 — 312-024/60005